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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JIMMY C. ROSE, WARDEN,
Petitioner,

vs.

STANLEY BARHAM CLARK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the state trial court's jury instructions on malice impermissibly shifted the burden of proving malice to the respondent?

2. Whether error in the state trial court's jury instructions on malice was harmless beyond a reasonable doubt?

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Tenn. Code Ann. §39-2402 [presently Tenn. Code Ann. §39-2-202] 2

Tenn. Code Ann. §39-2403 [presently Tenn. Code Ann. §39-2-211(a)] 5

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit was filed on April 1, 1985, and appears as Appendix A.

The unpublished memorandum opinion and order of the United States District Court for the Middle District of Tennessee, granting the writ of habeas corpus, was filed on July 16, 1984, and appears as Appendix B.

The unpublished opinion of the Court of Criminal Appeals of Tennessee, affirming the trial court's judgment, was filed on February 27, 1981, and appears as Appendix C.

The unpublished order of the Supreme Court of Tennessee, denying discretionary review, was filed on November 30, 1981, and appears as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 1, 1985. This petition was filed within sixty days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Const. Amend. XIV, §1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The respondent, Stanley Barham Clark, was indicted by the Rutherford County Grand Jury for two (2) counts of first degree murder[1] in the slayings of Joy Faulk and Charles Browning. The proof presented before the jury, as summarized by the United States Court of Appeals for the Sixth Circuit, showed as follows:

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[1] Tenn. Code Ann. §39-2401 [presently Tenn. Code Ann. §39-2-201]:

> If any person of sound memory and discretion, unlawfully kills any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder.

Tenn. Code Ann. §39-2402 [presently Tenn. Code Ann. §39-2-202]:

> An individual commits murder in the first degree if:
>
> (1) He commits a willful, deliberate, malicious and premeditated killing or murder.

> In December of 1978, Charles Browning and Joy Faulk were shot to death while sitting in the cab of Browning's pickup truck in a rural area of Rutherford County, Tennessee. Faulk and Browning had a relationship which angered [respondent], Faulk's former lover. The night of the murders a police officer observed a brownish colored pickup truck belonging to Clark pursuing Browning's truck in the general vicinity of the homicides.
>
> The murder weapon, a .25 caliber pistol, was identified as belonging to [respondent's] friend, Terry Hill. [Respondent] had borrowed the handgun from Hill a few days before the shooting and had informed Hill that the gun had been stolen; it was found following the murders on a roadside near Clark's home.
>
> Faulk's two young children, ages six and three, were with Faulk and Browning in the truck the night of the shooting, and were found afterward wandering along a rural road seeking help. The older child testified at trial that 'Clicker' (a nickname for [respondent]) had followed them the night of the shooting and then had shot her mother and Browning. Her testimony was corroborated by what she had told others the night of the incident. The police located [respondent] in his truck near the driveway to his home after the shootings. Clark fled from the police and forced a high speed chase before the officers were able to apprehand him.

(Appendix A, at A-1 - A-2).

With varying degrees of proof, the respondent alternately claimed that he did not commit the crimes; that he suffered from temporary insanity at the time of the commission of the crimes; that he was intoxicated at the time of the commission of the crimes; and that he suffered from amnesia at the time of the commission of the crimes.

Following the taking of proof, the trial court charged the jury on the applicable law, including an instruction in accordance with the Tennessee Pattern Jury Instruction on malice:

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously, but this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant or exists in the evidence of the State.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts or cirucmstances. A 'deadly weapon' is any weapon or instrument which may from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury.
>
> * * *
>
> The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all of the facts and circumstances developed by the evidence to determine whether the State has proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the killing was done with malice, then the Defendant cannot be convicted of murder . . . and you must acquit him of that offense.

(Dist. Ct. Ex. 1, pp. 1087-1089).

The jury returned a verdict finding the respondent guilty of the first degree murder of Joy Faulk; punishment was assessed at life imprisonment in the state penitentiary. The jury also

returned a verdict finding the respondent guilty of the second degree murder[2] of Charles Browning; punishment was assessed at ten (10) years imprisonment in the state penitentiary.

On appeal, the respondent challenged, *inter alia,* the malice instructions on the ground that they impermissibly shifted the burden of proof on that element. The Court of Criminal Appeals of Tennessee rejected the respondent's contentions and affirmed the trial court's judgment. The Supreme Court of Tennessee denied the respondent's application for permission to appeal.

Subsequently, the respondent filed a petition for the writ of habeas corpus in the United States District Court for the Middle District of Tennessee, alleging that the trial court's malice instructions violated due process of law pursuant to *Sandstrom v. Montana,* 442 U.S. 510 (1979). The district court agreed with the respondent's contention and granted a writ of habeas corpus ordering the State of Tennessee to retry the respondent within ninety (90) days or release him. This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit.

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[2] Tenn. Code Ann. §39-2403 [presently Tenn. Code Ann. §39-2-211(a)]:

All other kinds of murder shall be deemed murder in the second degree.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals erroneously found that the state trial court's jury instructions on malice violated due process.

The Court of Appeals for the Sixth Circuit has misapplied the holding of this Court in *Sandstrom v. Montana,* 442 U.S. 510 (1979). Furthermore, this Court should take this opportunity to determine under what circumstances the overall jury charge precludes a finding that the challenged instructions create a burden-shifting presumption on a particular element of the offense. The decision of the Court of Appeals is directly in conflict with the subsequent decision of the Supreme Court of Tennessee in *State v. Bolin,* 678 S.W.2d 40 (Tenn. 1984), wherein the highest state court has determined that similar malice instructions do not violate the principles set forth by this Court in *Sandstrom.* It is probable that the Tennessee state courts will apply *Bolin* in similar cases and affirm the challenged convictions, while the federal courts, in adjudicating the constitutionality of the instructions on habeas corpus review, will adhere to the decision of the Court of Appeals in this case. Therefore, this Court should grant the writ of certiorari and review the issues presented here.

In *Sandstrom,* the defendant was charged with "deliberate homicide", defined in the Montana statute as a criminal homicide committed "purposely or knowingly." Sandstrom admitted the homicide at his trial, but insisted that he did not commit the crime "purposely or knowingly." He argued that the jury instruction, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts", had the effect of shifting the burden of proof to him on the issue of whether the defendant acted "purposely or knowingly." *Id.,* at 512-513.

The Court said that the threshold inquiry to determining the constitutionality of such an instruction was to determine the nature of the presumption it described, which determination requires:

> careful attention to the words actually spoken to the jury, see *id.*, [*Ulster County Court v. Allen*, 442 U.S. 140 (1979)] at 157-159, n. 16, 99 S.Ct., at 2225, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Id., at 514. In *Ulster*, the Court distinguished between the two types of evidentiary devices, the permissive inference and the mandatory presumption. The permissive inference allows, but does not require, the triers of fact to infer the elemental fact from proof by the state of the basic fact and places no burden of any kind on the defendant. The mandatory presumption tells the triers of fact that they must find the elemental fact upon proof of the basic fact unless the defendant comes forward with some evidence to rebut the presumed connection between the two facts. *County Court of Ulster County v. Allen*, 442 U.S. 140, 156-157 (1979).

In *Sandstrom*, this Court concluded that a reasonable jury could have interpreted the jury instruction "as a direction to find intent upon proof of the defendant's voluntary action (and their 'ordinary' consequences) unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence — thus effectively shifting the burden of persuasion on the element of intent." *Id.*, at 517. That conclusion was based upon the force of the words, "the law presumes", and the failure of the trial judge to instruct that the jury presumption could be rebutted.

Montana's Rules of Evidence expressly stated that the presumption at issue could be overcome only "by a preponderance of evidence contrary to the presumption." This Court concluded that both the burden of production and the ultimate burden of persuasion on the issue of intent were thus shifted to the defendant in violation of the due process principle that protects the accused against conviction except upon proof

beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant was charged.

The petitioner submits that the words of the presumption in this case, the immediate context in which they appear and the overall context of the jury instructions, distinguish this case from the due process violation in *Sandstrom*.

Sandstrom repeatedly emphasized the significance of the failure to tell the jury that the presumption could be rebutted. However, the words of the presumption in the instant case are more permissive than "the law presumes that a person intends the ordinary consequences of his voluntary acts." The instruction in the instant case immediately stated that the presumption may be "rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State." Thus, there was no suggestion that such evidence must have been established by the respondent or that he had any burden of proof with respect to such evidence.

Moreover, aside from the malice instructions under attack, the instant trial court instructed the jury that the defendant was presumed innocent; that it was encumbent upon the state to prove each element of the offense beyond a reasonable doubt; that the presumption of malice may be rebutted by either direct or circumstantial evidence, or by both regardless of whether the same be offered by the defendant or exists in the evidence of the state; that malice cannot be inferred from mere deadly intent; that the jury should look to all the facts and circumstances developed by the evidence to determine whether the state has proven beyond a reasonable doubt the existence of malice; and that if the jury had a reasonable doubt as to whether the killing was committed maliciously, then the defendant must be acquitted of murder. (Dist. Ct. Ex. 1, pp. 1078, 1086-1089).

This Court has consistently recognized that, "a single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *Cupp v. Naughten,* 414 U.S. 141, 146-147 (1973). The overall charge in this case precludes a legal finding that a reasonable jury could have interpreted the questioned language as a mandatory presumption shifting the burden of proof to the defendant on the element of malice.

With the challenged instructions not requiring the respondent to prove the absence of malice and not requiring the respondent to present any evidence to rebut the presumption of malice, the petitioner submits that the Court of Appeals clearly erred in determining that the jury instructions concerning the presumption of malice which arises upon the use of a deadly weapon is violative of the respondent's constitutional rights by requiring him to rebut the element of malice necessary to sustain a conviction for first or second degree murder and by relieving the prosecution of its burden to prove each element of the crime beyond a reasonable doubt.

2. The Court of Appeals erroneously found that error in the state trial court's jury instructions on malice was not harmless beyond a reasonable doubt.

Finding that malice was a disputed element of the crime in the instant case, the Court of Appeals for the Sixth Circuit held that a traditional harmless error analysis was precluded by *Connecticutt v. Johnson,* 460 U.S. 73 (1983). The petitioner submits that the Court of Appeals erred in finding that malice was a disputed element and further erred in declining to apply the appropriate harmless error standard.

In *Johnson,* this Court divided equally on the appropriateness of a harmless error analysis in cases where jury instructions were found to be violative of *Sandstrom v. Montana,* 442 U.S. 510 (1979). Four justices favored a traditional harmless error approach, while four others would find harmless

error only under rare circumstances, with the remaining justice arguing that the writ of certiorari was improvidently granted. Given that this Court has not supplied clear guidance on this question, the Court of Appeals determined that *Sandstrom* errors are subject to a harmless error analysis only under rare circumstances. *See Engle v. Koehler,* 707 F.2d 241, 246 (6th Cir. 1983); *See also Conway v. Anderson,* 698 F.2d 282, 284 (6th Cir. 1983).

In *Conway,* the Court of Appeals held that the prejudicial effect of a *Sandstrom* error is primarily a function of the defense asserted at trial. Thus, where a defendant acknowledges that an intentional and malicious killing occurred, but claims nonparticipation, this type of error may be harmless. Conversely, where a defendant asserts a lack of *mens rea,* the error is prejudicial even if the proof of malice is substantial. *Id.,* at 285; *Engle v. Koehler, supra,* 707 F.2d at 246.

Contrary to the finding of the Court of Appeals, the petitioner asserts that the instant case falls within the former category. Under Tennessee law, malice is an intent to do an injury to another, a design formed in the mind to do mischief to another. Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is not malice against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit, and a heart fatally bent on mischief regardless of social duty. *Fox v. State,* 1 Tenn. Crim. App. 308, 441 S.W.2d 491 (1968). Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed, but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. *State v. Johnson,* 541 S.W.2d 417 (Tenn. 1976).

Under the facts of the case at bar, the petitioner asserts that the respondent presented only two viable defenses at trial: lack

of participation and temporary insanity. As to the respondent's defense that he was not involved in the murders, the respondent basically acknowledged that the murders were committed in a malicious manner. As to the respondent's defense of insanity at the time of the commission of the murders, such a defense acknowledges the elements of the crimes but disavows criminal culpability for their commission. *See Graham v. State,* 547 S.W.2d 531, 543 (Tenn. 1977). The petitioner therefore submits that the element of malice was not placed in issue by these two defenses.

Although there was some evidence presented before the jury that the appellee might have been intoxicated at the time of the commission of the crimes,[1] the Court of Appeals misinterpreted Tennessee Law concerning voluntary intoxication. Contrary to the appellate court's interpretation, voluntary intoxication may negate only the element of premeditation and does not, as a matter of law, negate the element of malice.[2] *State v. Adkins,* 653 S.W.2d 708 (Tenn. 1983); *State v. Bullington,* 532 S.W.2d 556 (Tenn. 1976).

Therefore, regardless of the state of the respondent's sobriety at the time of the commission of the crimes, the existence of the element of malice was not placed in issue by the limited proof showing voluntary intoxication.

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[1] Evidence of the respondent's intoxication was admitted through the testimony of defense psychiatrist Dr. John Griffin, whose testimony did not constitute substantive proof of intoxication. Rather, the doctor's testimony concerned itself with what the respondent told him during a mental evaluation.

[2] The record reveals that the jury was correctly instructed concerning the matter of voluntary intoxication. (Dist. Ct. Ex. 1, pp. 1096-1097).

Likewise, the Court of Appeals misinterpreted Tennessee law concerning the respondent's claim of amnesia.[3] The appellate court labeled the respondent's purported "defense" of amnesia as a "mental illness." However, contrary to the appellate court's interpretation, amnesia is not a defense to crime under Tennessee law. *Burton v. State,* 217 Tenn. 62, 394 S.W.2d 873 (1965); *Lester v. State,* 212 Tenn. 338, 370 S.W.2d 405 (1963); *Thomas v. State,* 201 Tenn. 645, 301 S.W.2d 358 (1957). The element of malice could therefore not have been placed in issue, as a matter of law, by the respondent's purported amnesia at the time of the commission of the crimes.

The petitioner further asserts that with the proof overwhelmingly establishing the element of malice, the Court of Appeals finding to the contrary is clearly erroneous. The proof shows that on the night of December 30, 1978, the respondent pursued the victims in his truck prior to ambushing them when they pulled into a driveway to let him pass their vehicle. (Dist. Ct. Ex. 1, pp. 65-67, 93-94, 204-205). With the victims' vehicle being blocked by the respondent's truck and another vehicle, the victims were unable to escape and offered no resistance as the respondent shot Charles Browning once in the head and shot Joy Faulk three times (two shots to the head and one shot to the back of her left shoulder). (Dist. Ct. Ex. 1, pp. 167, 175, 185, 201-202, 573, 578, 580). In order to insure that he killed the victims, the respondent placed his .25 caliber automatic pistol inside the cab of the victims' vehicle and then shot Browning from a distance of six to eight inches and shot Faulk from a distance

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[3] Again, evidence of the respondent's alleged amnesial was not admitted as substantive proof to establish that the respondent actually suffered from amnesia, but rather was admitted to establish what the respondent related to the defense psychiatrists. (Dist. Ct. Ex. 1, pp. 800, 841, 881). Interestingly, the respondent himself disagreed with the defense psychiatrists' diagnosis of amnesia, indicating to the state psychiatrist that he "knew where he was and what he had been doing" at the time the crimes were committed. (Dist. Ct. Ex. 1, pp. 935).

of no more than eighteen inches. (Dist. Ct. Ex. 1, pp. 107, 138, 227).

Other proof established that the respondent, who was Joy Faulk's former boyfriend, did not want Faulk to date other men even though they had stopped dating one month prior to the commission of the murders. (Dist. Ct. Ex. 1, p. 401). During the Fall of 1978, and particularly during November and December, the respondent on six different occasions threatened to kill Faulk if he ever caught her with another man. (Dist. Ct. Ex. 1, pp. 392, 395, 397, 462, 471, 508).

Still more proof establishing the element of malice showed that the respondent, who believed that Joy Faulk was dating other men (particularly Charles Browning) visited Browning's wife on December 25, 1978 in order to determine the nature of the Faulk-Browning relationship. At that time, the respondent made it clear that he was going to act upon his prior death threats, telling Mrs. Browning that "Well, I just wanted to find out what is going on before I got mad and flew off the handle and did what I had to do." (Dist. Ct. Ex. 1, pp. 412, 472-474). At the time he made this veiled threat, the respondent was in possession of the murder weapon. (Dist. Ct. Ex. 1, p. 507).

Finally, the evidence shows that the respondent intentionally and deceptively obtained the murder weapon well before the commission of the murders on December 30, 1978. In this regard, the proof shows that on the Saturday prior to Christmas Day, the respondent borrowed the murder weapon from a friend by concocting a bogus story to the effect that his (the respondent's) gun had been stolen. (Dist. Ct. Ex. 1, pp. 558, 602). With the proof showing that the respondent's gun had actually not been stolen, (Dist. Ct. Ex. 1, pp. 507, 511-512, 533-535), it is clear that the respondent obtained the murder weapon in advance for the sole purpose of committing murder.

Under the facts presented by this record, the petitioner submits that any error in the jury instruction on malice was harmless beyond a reasonable doubt. The Court of Appeals' finding to the contrary is therefore clearly erroneous.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-5744

STANLEY BARHAM CLARK,
Petitioner-Appellee,

vs.

JIMMY C. ROSE, WARDEN,
Respondent-Appellant.

On Appeal From The United States District Court
For The Middle District Of Tennessee

Decided and Filed April 1, 1985

BEFORE: KENNEDY and WELLFORD, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

PER CURIAM. Stanley Barham Clark, petitioner, was convicted in Tennessee state court of one count of first degree murder and one count of second degree murder. He was sentenced to live imprisonment in the state penitentiary for terms of life and ten years, respectively. Following his conviction, petitioner appealed to the Tennessee Court of Criminal Appeals. That court affirmed his conviction, and subsequently the Tennessee Supreme Court denied petitioner permission to appeal. Petitioner has instituted the present action, claiming that the trial court violated his fourteenth amendment right to due process by shifting to him the burden of disproving an element of his asserted offense under *Sandstrom v. Montana,* 442 U.S. 510 (1979). The district court agreed with petitioner and granted the writ of habeas corpus requested. The State of Tennessee now appeals.

In December of 1978, Charles Browning and Joy Faulk were shot to death while sitting in the cab of Browning's pickup truck

in a rural area of Rutherford County, Tennessee. Faulk and Browning had a relationship which angered petitioner, Faulk's former lover. The night of the murders a police officer observed a brownish colored pickup truck belonging to Clark pursuing Browning's truck in the general vicinity of the homicides.

The murder weapon, a .25 caliber pistol, was identified as belonging to petitioner's friend, Terry Hill. Petitioner had borrowed the handgun from Hill a few days before the shooting and had informed Hill that the gun had been stolen; it was found following the murders on a roadside near Clark's home.

Faulk's two young children, ages six and three, were with Faulk and Browning in the truck the night of the shooting, and were found afterward wandering along a rural road seeking help. The older child testified at trial that "Clicker" (a nickname for petitioner) had followed them the night of the shooting and then had shot her mother and Browning. Her testimony was corroborated by what she had told others the night of the incident. The police located petitioner in his truck near the driveway to his home after the shootings. Clark fled from the police and forced a high speed chase before the officers were able to apprehend him.

At trial, consistent with the Tennessee Pattern Jury Instructions, the court charged the jury on the issue of malice, a requisite element of both first and second degree murders:[1]

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption.

---

[1] First degree murder requires proof of a "willful, deliberate, malicious and premeditated killing." Tenn. Code Ann. § 39-2-202. Second degree murder requires a willful killing, done with either expressed or implied malice aforethought. *Gordon v. State*, 478 S.W.2d 911 (Tenn. 1971). "Expressed malice" is actually contemplating the injury to the party slain, while "implied malice" is the more general wicked, depraved and malignant state of mind. *See Fox v. State*, 1 Tenn. Crim. App. 308, 441 S.W.2d 491 (1968).

> Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously, but this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances. A 'deadly weapon' is any weapon or instrument which from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury.

Although petitioner failed to object to these trial instructions, he challenged their constitutionality in the Tennessee Court of Appeals. The Tennessee appellate court, rather than relying on this procedural default, rejected petitioner's constitutional challenge on its merits. The petitioner exhausted his state remedy, and the district court properly assumed jurisdiction of the habeas corpus action under 28 U.S.C. § 2554.

We are called upon, then, to decide (1) whether the jury instructions impermissibly shifted the burden of proof to the defendant, and (2) whether the error, if any, was harmless.

This court has previously considered similar issues and has concluded that such presumption-of-malice instructions violate the fourteenth amendment's due process clause, following *Sandstrom; see Phillips v. Rose,* 690 F.2d 79 (6th Cir. 1982); *Conway v. Anderson,* 698 F.2d 292 (6th Cir.), *cert. denied,* 103 S.Ct. 3092 (1983); and *Engle v. Koehler,* 707 F.2d 241 (6th Cir.), *cert. granted,* 104 S.Ct. 231 (1983), *aff'd by equally divided Court,* 104 S.Ct. 1673 (1984). That instruction given in *Phillips,* a Tennessee case, was:

> If a deadly weapon of any kind or character is handled in a manner so as to make the killing a natural or probable result, malice will be presumed from the use of the weapon.

690 F.2d at 80. A part of the instructions given in the present case is similar to those given in *Phillips*.

Appellee argues that the error, if any, was cured by another jury instruction in this case which directed the jury to consider all the evidence in reaching a verdict. We find this argument unpersuasive. We find the instructions in question here to run afoul of *Sandstrom*, and that *Phillips* is also persuasive, because the intent of petitioner, and other defenses raised by him relating to his mental capacity at the time, were very much at issue.

In *Connecticut v. Johnson*, 460 U.S. 73, 74 n.1 (1983), Justice Blackmun characterized three possible positions that may be taken in considering implications of *Sandstrom:*

> (1) *Sandstrom* errors may be harmless where "the evidence of guilt was overwhelming";
>
> (2) *Sandstrom* errors may be harmless where the affected element of the crime is not a disputed element in the case;
>
> (3) *Sandstrom* errors may never be considered harmless.

Justice Blackmun noted that authority existed for all three views.

In *Johnson*, speaking through Justice Powell, four Justices, taking a different position than did Justice Blackmun, applied a traditional harmless error analysis established in *Chapman v. California*, 386 U.S. 18 (1967).[2] Under this analysis, error may

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[2] Justice Stevens in *Johnson* sided with neither Justice Blackmun nor Justice Powell. Rather, he was of the view that harmless error is not a matter of constitutional dimension, and thus where not applied

be disregarded where the beneficiary of the error "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24.

In *Engle v. Koehler,* 707 F.2d at 246, we observed:

> The prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial. If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of *mens rea,* a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial.

The Court held that because the defendant in that case admitted the killing, "but denied having the requisite *mens rea* to sustain a murder conviction because of the combined effects of intoxication, the librium pills and mental disease," the trial court's instructions in regard to malice and intent could not be considered harmless.

Thus both *Phillips* and *Koehler* would seem to indicate that the *Sandstrom* error is not harmless where, as here, defendant claims, among other defenses: (1) because of mental illness and intoxication he was not guilty; and (2) temporary insanity. Clark therefore asserted clearly "lack of *mens rea,*" and it cannot be denied that the placing of the burden on defendant to show that he lacked the requisite intent required under the first degree murder charge could be prejudicial. *Compare Conway v. Anderson,* 698 F.2d at 285, where retroactive application of *Sandstrom* was recognized and it was held that "the corrupting effect of a *Sandstrom* instruction is to a great extent a function

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by the state appellate court, would not warrant certiorari action by the Supreme Court. He would have dismissed the writ, thus, in effect, affirming the state court, and joined the four justice plurality as to the result reached.

of the defense...imposed at trial." The court there also found that where *mens rea* is "integral to the criminal offense...a *Sandstrom* instruction...possesses the capability of being extremely prejudicial." *Id.*

Accordingly, we agree with the trial court in this case that there was a *Sandstrom* violation inherent in the instructions given by the Tennessee trial court, and that in this murder case involving a defense of lack of *mens rea,* the error was not harmless beyond a reasonable doubt, despite the substantial evidence of petitioner's guilt presented to the jury.

Were we writing on a clean slate, we would direct our inquiry to that suggested by Justice Powell (dissenting) in *Connecticut v. Johnson,* 460 U.S. at 97 n.5:

> the inquiry is whether the evidence is so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.

If that were the question in this case, apart from prior precedent established in the cases cited from our circuit (*Phillips, Koehler,* and *Conway*), we might be able to respond in the affirmative.

For the reasons stated, however, we must AFFIRM the district court and direct the issuance of the writ of habeas corpus unless the State of Tennessee elects to re-try petitioner within ninety (90) days from the issuance of this Per Curiam.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Civil action no. 3:83-0766

Stanley Barham Clark,
Petitioner,

v.

Jimmy C. Rose, etc.,
Respondent.

MEMORANDUM OPINION AND ORDER

This is an application by a state-prisoner for the federal writ of habeas corpus. 28 U.S.C. § 2254(a). The petitioner Mr. Stanley Barham Clark was convicted on July 20, 1979 in the Circuit Court of Rutherford County, Tennessee of murder in the first and second degrees.[1] *Inter alia,*[2] Mr. Clark contends that certain instructions given the jury shifted effectively the burden of proving malice, an essential element of the crimes charged, from the prosecution to him, in violation of his right to due process of law, Constitution, Fourteenth Amendment. *See Sand-*

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[1] The petitioner was sentenced to life imprisonment on the first degree murder conviction and to 10-years' imprisonment on the second degree murder conviction. Both such convictions were affirmed on direct appeal by the Court of Criminal Appeals of Tennessee, and the petitioner's application for permission to appeal to the Supreme Court of Tennessee was denied.

[2] Mr. Clark asserts some 8 grounds in support of his petition. Each of those grounds was presented to the state appellate courts, and therefore, as the respondent concedes, the applicant has exhausted his available state remedies. *See Rose v. Lundy,* 455 U.S. 509, ____, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982); *Bowen v. State of Tennessee,* 698 F.2d 241, 243-244 [2] (6th Cir. 1983) (en banc).

strom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979).[3] Under the law of this Circuit, such contention has merit.

I.

On the cold, rainy night of December 30, 1978, Mr. Charles Browning and his companion Ms. Joy Faulk were shot to death at near point-blank range while they sat in the cab of Mr. Browning's pickup truck in a rural area of Rutherford County, Tennessee. Ms. Faulk's two young daughters Mitzi and Michelle, ages 6 and 3, respectively, were with their mother at the time of the shooting and were found afterward wandering along a roadway in search of assistance. The petitioner, a former live-in boyfriend of Ms. Faulk who had threatened to kill her if he ever caught her with another man, was charged with two counts of murder in the first degree. His trial began on July 16, 1979 and was presided over by the Honorable William S. Russell.[4]

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[3] *Sandstrom* was decided less than a month before the commencement of Mr. Clark's trial.

[4] After a decade of service on the Court of Criminal Appeals of Tennessee, Judge Russell retired as a presiding judge thereof in 1979. Previously, he had served as a judge of the 23rd Judicial Circuit of Tennessee, which court exercised trial-jurisdiction of civil and criminal actions. From 1976-1981, Judge Russell chaired a special committee appointed by the Supreme Court of Tennessee to study and promulgate what ultimately were adopted as the Tennessee Rules of Cirminal Procedure. Following his "retirement", Judge Russell has sat periodically as a judge in the trial- and intermediate-appellate-courts of Tennessee, and as a special justice on the Supreme Court of Tennessee.

The Court of Criminal Appeals of Tennessee characterized the case against Mr. Clark as substantially circumstantial[5] and involving " * * * a somewhat complicated domestic situation. * * * " *State of Tennessee,* appellee, v. *Stanley Barham Clark,* appellant, unpublished opinion of February 27, 1981 in no. 79-106-II. Such appellate Court summarized the evidence thusly:

> * * * The former husband of Joy Faulk, one of the victims, is the stepbrother of Shirley Browning the wife of the other victim. Joy Faulk and Charles Browning were involved in a relationship which had considerably agitated defendant. Prior to taking up with Browning, Joy Faulk and Clark had lived together. Their cohabitation was apparently a stormy one. After they separated he became very upset because she was dating other men, including Browning. This homicide occurred on the night of December 30, 1978. Shortly after 9:00 on that night, a police officer observed a brown, or brownish colored pickup truck pursuing a red pickup truck in the general vicinity of the homicide scene. The brown truck was subsequently identified as the property of defendant. The red truck was owned by Charles Browning. An hour or two later the bodies of Browning and Joy Faulk were discovered in the truck which was parked in the driveway of Mrs. Faulk's former brother-in-law. Mitzi Faulk, six-year-old daughter of Joy Faulk, and her three-year-old sister, were passengers in Browning's truck at the time of the homicide. She told witnesses, and testified, that defendant, who was known as "Clicker" had followed them into the driveway of Jeff Faulk and shot her mother and

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[5] Mitzi Faulk, an eyewitness to the shootings, identified Mr. Clark positively as the killer. Although her testimony was discredited on cross-examination, she was rehabilitated through the testimony of other witnesses.

> Charles Browning. The murder weapon, a .25 caliber pistol, had been borrowed by defendant from a friend, Terry Hill, a few days before the shooting occurred. He told Hill the pistol had been stolen. Sometime later, it was found by the roadside near defendant's home. While police officers were searching for him on the night of the homicide, they encountered him in his pickup truck near the driveway to his home. He fled, resulting in a high speed chase for some distance before he was apprehended.
>
> * * * * * *

Ib., at 1-2.

II.

The trial-judge instructed the jury[6] that in order to find the petitioner guilty of murder in the first degree, the State must have proven beyond a reasonable doubt *inter alia:*

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[6] It does not appear that defense counsel objected at trial to any of the challenged jury instructions in accordance with Tennessee's contemporaneous-objection rule. *See* Rule 30(b), Tenn.R.Crim.P.; *Pulley v. State,* 506 S.W.2d 164, 167 [2,3] (Tenn.Crim.App. 1973), *cert.den.* by Supreme Court of Tennessee (1974) (error in jury instructions cannot be raised for the first time on appeal). The respondent does not argue, however, that the bar of *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), should be applied so as to preclude consideration of this claim on its merits.

It is clear that *Wainwright v. Sykes, supra,* does not preclude this Court from reaching the merits of the instant claim because the Court of Criminal Appeals of Tennessee did not rely on the failure of Mr. Clark to make a contemporaneous-objection but reached the merits of this claim, holding that the challenged instructions did not violate *SAndstrom, supra,* at 13-15. " * * * Where a state appellate court does not rely on a procedural default, but reaches the merits of the federal law claim, the *Sykes* bar is inapplicable. * * * " *Melchior v. Jago,* 723 F.2d 486, 490 [4] (6th Cir. 1983), *cert.den.* ____ U.S. ____, 104 S.Ct. 2156, ____ L.Ed.2d ____ (1984).

> * * * That the killing was malicious: That is, that the Defendant was of the state of mind to do the alleged wrongful act without legal jurisdiction or excuse. *If it is shown beyond a reasonable doubt that the alleged victims were killed, the killing is presumed to be malicious in the absence of evience which would rebut the implied presumption.* [Emphases provided here.] * * *
>
> * * * * * * *

Transcript, pp. 1084-1085. As to the lesser-included offense of murder in the second degree, the jury was instructed that the State must have proven beyond a reasonable doubt *inter alia* that the killing "was malicious" and that malice "is an essential ingredient" of second degree murder. *Ib.*, at 1086. Additionally, the trial judge charged:

> * * * * * *
>
> *All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously.* But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.
>
> *Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree* unless it is rebutted by other facts and circumstances. * * *
>
> * * * * * *

> The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all the facts and circumstances developed by the evidence to determine whether the State has proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the alleged killing was done with malice, then the Defendant cannot be guilty of murder in the second degree and you must acquit him of that offense.
>
> * * * * * * *

Ib., at 1087-1089 (emphases provided here).

There is absolutely no doubt that the trial judge instructed the jury in accordance with the settled law of Tennessee;[7] in fact,

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[7] It has long been the rule in Tennessee that all homicides are presumed to be malicious. *See Everett v. STate,* 528 S.W.2d 25, 26 [2] (Tenn. 1975) ("All homicides are presumed to be malicious in t absence of evidence which would rebut the implied presumption."); *Sikes v. STate,* 524 S.W.2d 483, 485 [2] (Tenn. 1975)(same); *Gann v. State,* 214 Tenn. 711, 383 S.W.2d 32, 36 [11] (1964) (same); *Lewis v. State,* 202 Tenn. 328, 304 S.W.2d 322, 324 [1] (1957) (where a homicide is clearly proven and the slayer ascertained, and nothing else is shown, the killing is presumed to have been done maliciously); *Mitchell v. State,* 13 Tenn. (5 Yerg.) 340, 349-350 (1833) ("[if] the killing be proved, the law presumes that it was malicious, and [] it was incumbent on the defendant to show, by proof, matters in alleviation, or that it was a less offence"); *Coffee v. State,* 11 Tenn. (3 Yerg.) 283, 291 (1832) ("if A kill B, and that fact alone being established by the State, the malice is presumed, and the *onus* of exculpation is upon the defendant").

Additionally, the law of Tennessee presumes malice form the use of a deadly weapon. *Everett v. State, supra,* 528 S.W.2d at 26 [2]; *Sikes v. State, supra,* 524 S.W.2d at 485 [3]; *Gann v. STate, supra,* 383 S.W.2d 36 [12]; *Smith v. State,* 212 Tenn. 510, 370 S.W.2d 543, 545 [4] (1963); *Nance v. STate,* 210 Tenn. 328, 358 S.W.2d 327, 329 [4] (1962). These prsumptions of malice appear to be an outgrowth of the (now) unconstitutional presumption that every person intends the usual and natural consequences of his or her acts. In *Draper v. STate,*

his instructions were identical to those contained in the Tennessee Pattern Instructions.[1] However, some three years after the trial under consideration was completed, the Court of Appeals for this Circuit held that such "presumption-of-malice" instructions were infirm constitutionally under *Sandstrom*,

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63 Tenn. 246, 247 (1875), the Supreme Court of Tennessee approved the jury instruction that

> * * * "every man is presumed to be innocent, until his guilt is legally made to appear; but when a homicide is clearly proven, and the slayer ascertained, and nothing more appears, the killing is presumed to be criminal, as every person is presumed to intend the usual and natural consequences of his acts."

The highest Court of Tennessee does not appear to have considered the validity of the foregoing presumptions subsequent to the decision of the Supreme Court of the United States in *Sandstrom*. Interestingly, however, the Supreme Court of Tennessee stated recently that "* * * [m]alice may be *inferred* [emphasis provided] from the use of [a deadly weapon]. * * *" *State v. Caldwell*, ____ S.W.2d ____, ____ (Tenn. 1984) (decided April 30, 1984). There is, of course, a big difference between an instruction which permits malice to be *inferred*, and one which says it will be *presumed*.

"* * * While presumptions of an element [of a crime] are clearly unconstitutional, premissive inferences do not run afoul of the Constitution. * * *" *Carter v. Jago*, 637 F.2d 449, 455-456 [4] (6th Cir. 1980), *cert.den.* 456 U.kS. 980, 102 S.Ct. 2249, 72 L.Ed.2d 856 (1982), citing *Sandstrom, supra*, (upholding instruction that the jury "may infer" malice where one intentionally shoots another with a weapon in a manner calculated to cause death). *Cf. Harless v. Anderson*, 664 F.2d 610 (6th Cir. 1981), *rev'd. on other grounds*, 459 U.S. 4, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982)(instruction requiring jury to find malice if death caused by use of gun is unconstitutional). "* * * This distinction between a permissible inference and a mandatory or burden-shifting presumption is critical. * * *" *Krzeminski v. Perini*, 614 F.2d 121, 125, n. 4 (6th Cir. 1980), *cert.den.* 449 U.S. 866, 101 S.Ct. 199, 66 L.Ed.2d 84 (1980).

[1] *See* 7 West's Tennessee Practice, Tennessee Pattern Jury Instructions: Criminal, §§20.01, 20.04.

supra,[9] because they " • • • clearly had the effect of shifting the burden of persuasion regarding malice, an element of both first and second degree murder in Tennessee, to the defendant. • • •"*Phillips v. Rose,* 690 F.2d 79, 81 (6th Cir. 1982); *accord: Lockett v. Arn,* 728 F.2d 266, 272 (6th Cir. 1984) (*mens rea* element of crime cannot be presumed from defendant's acts; such a presumption forces defendant to assume burden of disproving an essential element of the crime); *Engle v. Koehler,* 707 F.2d 241 (6th Cir. 1983), *aff'd. by equally-divided Court* ____ U.S. ____, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984); *Krzeminski v. Perini, supra,* 614 F.2d at 123-124 [1] ("What the state may not do is presume that an element of a crime exists as a result of given conduct and then place the burden of showing otherwise on the defendant.")

The respondent argues there was no *Sandstrom* deficiency here because the trial-judge instructed the jury also that the burden was on the State to prove the existenc eof malice beyond a reasonable doubt and that the jury should consider all the facts and circumstances in determining whether the State had met such burden. This very argument was rejected in *Phillips v. Rose, supra,* because these additional instructions are not inconsistent rhetorically with the existence of a burden-shifting presumption, since a reasonable juror could have regarded the presumption of malice as a means by which proof of malice beyond a reasonable doubt could be satisfied. *Id.,* 690 F.2d at 81; *accord: Engle v. Koehler, supra,* 707 F.2d at 245.

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[9] Of course, *Sandstrom* is applied retroactively in this Circuit. *Engle v. Koehler, supra,* 707 F.2d at 244, n. 1; *Burton v. Bergman,* 649 F.2d 428, 431, n. 3 (6th Cir. 1981), *vac't'd. on other grounds* ____ U.S. ____, 102 S.Ct. 2026, 72 L.Ed.2d 477 (1982). The Court of Criminal Appeals of Tennessee has also applied *Sandstrom* retroactively because it "• • • did nsot elucidate some new principle of constitutional law, but reiterated a rule that was conclusively stated as long ago as 1952. • • •" *State v. Chavis,* 617 S.W.2d 903, 908 (Tenn.Crim.App. 1980), *permis.app.den.* (Tenn. 1981), citing *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed.2d 288 (1952).

Under the instructions given by the trial-judge, the jury could have understood reasonably that the prosecution could meet its burden of proving the element of malice merely by showing that a killing had occurred; that once the State demonstrated a killing, malice was presumed, and it then devolved upon Mr. Clark to negate the existence of such element. "* * * Such an instruction effectively shifts the burden to the defendant of disproving an element of the crime. This is constitutionally forbidden. * * *" *Krzeminski v. Perini, supra,* 614 F.2d at 124-125; *accord: Lockett v. Arn, supra,* 728 F.2d at 272 ("Such a presumption forces the defendant to assume the burden of disproving an essential element of the crime.")

III.

The remaining consideration, then, is whether the giving of the foregoing jury-instructions constituted harmless error. "* * * [H]armless error in the context of an asserted constitutional violation is an extremely narrow standard, premitting the state to avoid retrial only if it can be demonstrated beyond a reasonable doubt that the error did not contribute in any way to the conviction. * * *" *Melchior v. Jago, supra,* 723 F.2d at 493 [14].

In this Circuit,

> * * * the prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial. If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of *mens rea,* a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial. * * *

Engle v. Koehler, supra, 707 F.2d at 246; *accord: Lockett v. Arn, supra,* 728 F.2d at 273; *Conway v. Anderson,* 698 F.2d 282, 285 (6th Cir. 1983), *cert.den.* ____ U.S. ____, 103 S.Ct.

3092, 77 L.Ed.2d 1352 (1983); *see Connecticut v. Johnson*, ____ U.S. ____, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983)(plurality opinion);[10] *cf. Steele v. Taylor*, 684 F.2d 1193, 1205, n. 14 (6th cir. 1982), *cert. den.* ____ U.S. ____, 103 S.Ct. 1501, 75 L.Ed.2d 932 (1983) ("Constitutionally defective instructions impose an improper framework for the evaluation of all evidence and can virtually never be harmless.")

Clearly, this is not a situation where the defendant acknowledged at trial that an intentional, malicious killing had occurred and only claimed non-participation therein. Instead, Mr. Clark's defense accented both the physical and mental elements of the offenses charged. His defense was threefold: (1) that he did not commit the killings and knew nothing about them;[11] (2) that, because of mental-illness and voluntary intoxication, he was not guilty; and (3) that, even if the jury should

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[10] The federal Supreme Court has not given clear guidance on the standard of harmless error which should be applied to a *Sandstrom*-deficient jury instruction. In *Connecticut v. Jonson, supra*, a plurality of four justices followed essentially the standard applied in this Circuit — that such an instruction could constitute harmless error only in rare cases, such as where the defendant conceded the *mens rea* elements of the offense; four other justices favored a traditional harmless-error approach. Until further guidance is provided by the Supreme Court of the United States, this Circuit continues to follow the standard it has used in the past. *Engle v. Koehler, supra.*

[11] In the words of the Court of Criminal Appeals of Tennessee: "Defense counsel exerted a diligent effort to show, among other theories, that animosity existed toward Joy Faulk on the part of Sam Faulk, her ex-husband, and that Shirley Browning, wife of Charles Browning also had the motive and the incentive to commit the homicide[s].***" Opinion, *supra*, at 2.

find the existence of all elements of the crimes, he should be found not guilty by reason of insanity.[12]

From the outset of the trial, it was clear that the defense was unlikely to concede anything, rather that it intended to put the State to its burden of proving beyond a reasonable doubt every element of the offenses charged, physical as well as mental. The reliance on a *mens rea* defense, in addition to the claim of non-participation, was evident throughout the entire trial:

(1) In his opening statement, counsel for Mr. Clark told the jury:

* * * * * *

> We will further show you that even if, as unlikely as it might be, the Prosecutor were able to establish to your satisfaction that Stanley Clark did commit the acts alleged, we will show you by psychiatric experts that Stanley Clark has no recollection of participating in any act as is charged against him and that, even if the State should submit evidence to establish that the acts were committed, then the evidence will show that Stanley Clark has total amnesia of any knowledge of the deaths of Joy Faulk or Charles Browning and that due to his mental condition he could not have possessed the mental capacity required to establish his guilt.

* * * * * *

Transcript, at 24.

(2) In his cross-examination of the witness Ms. Sylvia Kay Barrett, counsel for Mr. Clark brought out evidence that, for some months prior to the homicides, the petitioner had engaged

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[12] Under the law of Tennessee, the insanity defense is considered by the jury only if it has first found that the State has proven beyond a reasonable doubt each element of the offense charged. *See Graham v. State*, 547 S.W.2d 532, 543 (Tenn. 1977), citing the suggested jury-charge in *United States v. Brawner*, 471 F.2d 969, 1008 (D.C. Cir. 1972); Tennessee Pattern Jury Instructions: Criminal, § 36.06.

in strange behavior; had acted as if he really didn't know what he was doing; lost some 35 pounds in weight; could not eat or sleep; was bothered by his reminences of his experiences in Viet Nam; could see in his dreams Vietnamese people coming at him; was greatly depressed; acted as if he were a different person; grew progressively more quiet; was very withdrawn; and was upset physically and depressed emotionally. *Ib.* at 521-525.

(3) The trial judge himself recognized (after the State had rested its case-in-chief) the nature of the evolving defense: "***The principal issue here, as the Court discerns it after three and one-half days of trial, is who killed these people, or if this Defendant did it what was his state of mind?" *Ib.*, at 763.

(4) Immediately prior to the presentation of evidence for the defense, the trial judge inquired of counsel whether he should charge the jury on all four degrees of homicide. *Ib.*, at 774. Counsel for Mr. Clark requested him to do so, and stated "***that the appropriate charge is that if you find the Defendant killed while suffering from a mental disease or defect so great as to render him unable to formulate a specific intent to kill or to harbor malice, but not so great as to render him insane, his killing is involuntary manslaughter." *Id.*

(5) The trial judge recognized also at this point in the trial that there had been "***some rather tangential indication that there might be a drunkenness factor in the defense and, of course, there is a charge that reduces what would otherwise be first degree murder to no more than second degree murder in the event of an effect [of intoxication].***" *Ib.*, at 776. Defense counsel requested that such a jury instruction be given. *Id.*

(6) As its first witness, the defense called Dr. John Griffin, a psychiatrist, who testified that, in his professional opinion, Mr. Clark was suffering from a longstanding condition of depression at the time of the homicides and "***that his mental illness was such that it rendered him substantially incapable of conforming his behavior to the requirements of the law.***" *Ib.*, at

799-800. The testimony of Dr. Griffin supported also the petitioner's claim of amnesia, *ib.*, at 800, and that of voluntary intoxication, *ib.*, at 814-815. (Mr. Clark had told Dr. Griffin that, on the day of the homicides, he had consumed as much as 6 six-packs of beer plus a quantity of Vodka).

(7) Mr. Clark called as his second witness Dr. Roger White, also a psychiatrist. Dr. White testified that, in his professional opinion, Mr. Clark was suffering at the time of the homicides from "•••a serious and rather longstanding depressive neurosis •••" as a result of which "•••he was not able to conform his behavior to the requirements of the law at that time •••." *Ib.*, at 859-860. Dr. White's testimony supported further the petitioner's claim of amnesia. *Ib.*, at 860-862.

This Court's review of the trial record reflects that Mr. Clark asserted a *mens rea* defense which encompassed the essential element of malice. The trial judge instructed the jury that

> •••[a] case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exits in the mind of the slayer. Malice is an intent to do any injury to another, a design formed in the mind of doing mischief to another.
>
> *Ib.*, at 1086-1087.

The psychiatric- and other -evidence which the defense offered bore on the petitioner's state-of-mind at the time of the slayings. This evidence was [illegible]arly relevant on the issue of malice, for, unless Mr. Clark's state-of-mind was such that it harbored "wicked intent", or intent or design to injure or do mischief to another, he did not act with malice and could not have been guilty of murder: As the trial judge told the jury, the element of malice turned on the petitioner's state-of-mind, and, specifically, whether he "•••was of the state of mind to do the alleged wrongful act without justification or legal excuse." *Ib.*, at 1084.

Additionally, the evidence of voluntary intoxication[13] related to the issue of malice, for, under the law of Tennessee, intoxication "***may negate a finding of specific intent. Thus, when the inquiry is whether or not the accused is guilty of first degree murder, it becomes relevant to know whether or not the accused was in a state of intoxication and, if so, the extent of its effect upon his mental state.***" *State v. Bullington,* 532 S.W.2d 556, 560 (Tenn. 1976).

"***[E]ven when an intoxicated defendant is capable of forming specific intent, his drunkenness may be considered in determining whether he specifically intended the particular act for which he is on trial.***" *State v. Adkins,* 653 S.W.2d 708, 713 [3] (Tenn. 1983). Mr. Clark's alleged amnesia was relevant in so far as it reflected upon his state-of-mind at the time these offenses were committed. See *Lester v. State,* 212 Tenn. 338, 370 S.W.2d 405, 409 (1963); *Sparkman v. State,* 469 S.W.2d 692, 696-697 (Tenn. Crim. App. 1970), *cert. den.* (Tenn. 1970).

This is not a situation wherein the defendant admitted the *mens rea* elements of the offenses and relied solely on the defense of insanity, thereby sufficiently reducing the likelihood that the jury applied the erroneous *Sandstrom* instruction, *cf. Connecticut v. Johnson, supra,* ____ U.S. at ____, 103 S.Ct. at 978; to the contrary, Mr. Clark relied upon a *mens rea* defense and offered evidence on his mental-condition which bore on that defense as well as on his claim of insanity. Under these circumstances, the Court does not conclude that the challenged jury instructions contributed in no way to the petitioner's convictions for murder.

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[13] Although the evidence of voluntary intoxication was rather weak, it was sufficient to submit to the jury, as the trial judge did in his instructions. Transcript, at 1096-1097.

IV.

The petitioner, thus, is entitled to relief. The writ of habeas corpus will issue, directing the respondent-warden or his successor(s) to release the petitioner Mr. Stanley Barham Clark from custody under the aforementioned convictions forthwith unless the state of Tennessee has begun a retrial of him within 90 days herefrom.[14] *Peyton v. Rowe,* 391 U.S. 54, 66-67, 88 S.Ct. 1549, 1556 [8], 20 L.Ed.2d 426 (1968); *Irvin v. Dowd,* 366 U.S. 717, 728-729, 81 S.Ct. 1639, 1646 [13, 14], 6 L.Ed.2d 751 (1961).

ENTER: /s/ C. G. Neese
United States Senior Judge
District Judge by designation and
assignment

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[14] The Court does not consider redundantly any of the other grounds urged by Mr. Clark in his petition.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Civil action no. 3:83-0766

STANLEY BARHAM CLARK,
Petitioner,

vs.

JIMMY C. ROSE, etc.,
Respondent.

ORDER

For the reasons assigned in the accompanying memorandum opinion and order of this date, the writ of habeas corpus hereby is

GRANTED, and the respondent-warden, or his successor(s) in office, hereby is

ORDERED to release the petitioner Mr. Stanley Barham Clark from custody under his convictions of July 20, 1979 in the Circuit Court of Rutherford County, Tennessee forthwith unless the state of Tennessee has begun a retrial of him within 90 days herefrom.

ENTER: /s/ C. G. Neese
United States Senior Judge
District Judge by designation
and assignment

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
NASHVILLE, SEPTEMBER SESSION, 1980

No. 79-106

RUTHERFORD COUNTY

Hon. William S. Russell, Judge

(Murder)

State of Tennessee,
Appellee,

v.

Stanley Barham Clark,
Appellant,

FOR APPELLEE:

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Guy M. Dotson
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FOR APPELLANT:

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AFFIRMED

OPINION FILED: Feb. 27, 1981

CHARLES H. O'BRIEN, JUDGE

OPINION

Defendant appeals from his convictions for First and Second Degree murder in the Criminal Court for Rutherford County.

Numerous issues are raised, each of which he insists is grounds for reversal of his conviction.

Initially, it is contended that the evidence is insufficient to support the verdict because it fails to establish his guilt beyond a reasonable doubt.

This was substantially a circumstantial evidence case. It is defendant's contention that the evidence showed several other people had the opportunity and the motivation to kill the two (2) victims. This case involved a somewhat complicated domestic situation. The former husband of Joy Faulk, one of the victims, is the stepbrother of Shirley Browning the wife of the other victim. Joy Faulk and Charles Browning were involved in a relationship which had considerably agitated defendant. Prior to taking up with Browning, Joy Faulk and Clark had lived together. Their cohabitation was apparently a stormy one. After they separated he became very upset because she was dating other men, including Browning. This homicide occurred on the night of December 30, 1978. Shortly after 9:00 on that night, a police officer observed a brown, or brownish colored, pickup truck pursuing a red pickup truck in the general vicinity of the homicide scene. The brown truck was subsequently identified as the property of defendant. The red truck was owned by Charles Browning. An hour or two later the bodies of Browning and Joy Faulk were discovered in the truck which was parked in the driveway of Mrs. Faulk's former brother-in-law. Mitzi Faulk, six-year-old daughter of Joy Faulk, and her three-year-old sister, were passengers in Browning's truck at the time of the homicide. She told witnesses, and testified, that defendant, who was known as "Clicker" had followed them into the driveway of Jeff Faulk and shot her mother and Charles Browning. The murder weapon, a .25 caliber pistol, had been borrow-

ed by defendant from a friend, Terry Hill, a few days before the shooting occurred. he told Hill the pistol had been stolen. Sometime later, it was found by the roadside near defendant's home. While police officers were searching for him on the night of the homicide, they encountered him in his pickup truck near the driveway to his home. He fled, resulting in a high speed chase for some distance before he was apprehended.

Defense counsel exerted a diligent effort to show, among other theories, that animosity existed toward Joy Faulk on the part of Sam Faulk, her ex-husband, and that Shirley Browning, wife of Charles Browning, also had the motive and the incentive to commit the homicide. All of this evidence was laid out before the jury and was rejected by them in favor of the theory of the homicide presented by the State. A defense of present insanity at the time of the homicide also left the jury unconvinced.

It is not the function of an appellate court to reweigh evidence adduced at a criminal trial; a guilty verdict, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts of testimony in favor of the theory of the State. *State v. Hatchett,* 560 S.W.2d 627, (Tenn. 1978). The standard of review in an appellate court is to determine whether or not a rational trier of fact could have concluded beyond a reasonable doubt that the defendant was guilty of the offenses. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed2d 560 (1979); T.R.A.P. 13(e). This standard of review applies equally to the insanity defense. If the State's evidence was competent, and properly admissible we find it adequate and ample to support the jury's verdict. The question of the competency of all the State's proof is the subject of another assignment which will be dealt with in due order.

An issue of first impression in this State has been raised by defendant's claim of error in denial of a motion for bifurcated trial based upon his insanity defense. We have examined the authorities submitted by both the defendant and the State on this issue and find that such a procedure has been recognized in

only one isolated jurisdiction, either Federal or State. The United States Supreme Court has ruled there is no constitutional compulsion to require two-part jury trials. See *Spencer v. Texas,* 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). Tennessee does provide for a bifurcated proceeding on the issue of guilt and punishment when a jury returns a verdict of guilty in a first degree murder case. Neither legislative enactment nor case law otherwise provide for the conduct of such trials in this State, and in the absence of any showing of denial of fundamental fairness in the single jury procedure employed in this case, we do not find any deviation from such proceedings to be warranted.

Defendant says the indictment should have been dismissed because of the State's destruction of material evidence.

This homicide occurred on December 30, 1978. The two deceased were found in the pickup truck owned by Charles Browning, one of the victims. The police made a thorough examination of the truck, including a fruitless search for fingerprints. A few days later, the automobile was turned over to the widow of Charles Browning, and sometime later was evidently sold by her. The earliest indication of proceedings initiated by counsel in this case was a petition for habeas corpus filed on February 13, 1979, prior to defendant's indictment. On June 13, 1979 defense counsel filed a general motion for discovery. This motion was overruled prior to trial. Among other things found in the pickup truck were four (4) .25 caliber shell casings which the evidence showed were fired from a pistol borrowed by the defendant from one of the State witnesses. In their continuing investigation, the police later found a fifth .25 caliber shell casing on the ground, in the driveway at the scene of the homicide. It was developed at trial that this shell casing was lost by one of the investigating of officers prior to trial and before it had been submitted for examination to the crime laboratory. On July 16, 1979, a motion to dismiss the indictment due to the State's destruction of physical evidence was filed and denied. At

the conclusion of the State's proof defendant renewed the motion to dismiss the indictment because of the destruction of evidence involving the truck and the shell casing, and also moved for a judgment of acquittal based on the same issues. Indicating that there had been no evidence of any deliberate destruction or disposition of evidence the trial judge denied the motions. He held that defendant would be entitled to a hearing on said evidence at any time it could be produced.

We find no merit to defendant's contention. There is no indication in this record that any exculpatory evidence was withheld, destroyed, or concealed by the State. A motion for discovery must be explicit. See *United States v. Agurs,* 427 U.S. 97, 96 Supreme Court 2392, 49 L.Ed.2d 342 (1976). A broadside attack by a general motion in the hopes of finding some bit or piece of information in the State's possession is not justified. Defendant failed to make any timely request for exculpatory evidence, and, moreover failed to prove that any evidence held by the State at any time was exculpatory.

Defendant claimed prejudice due to an emotional outburst by the prosecutrix.

The trial had barely begun when, during the testimony of a sheriff's deputy, the record shows, "Prosecutrix Shirley Browning weeps audibly." Defense counsel immediately requested a bench conference in which he claimed prejudice because of her weeping. The jury was excused and the court admonished Mrs. Browning that could she not control her emotions and retain her composure, she would be required to leave the court room. A motion for mistrial was overruled. The trial judge stated his opinion that the audible sobs of the prosecutrix were not so unusual, inflammatory, or prejudicial as to warrant such action. After studying the record, we have reached the same conclusion. It was a natural expression of grief which was not repeated. No cautionary instruction to the jury was requested. The record does not contain any indication of an emotional demonstration of sufficient significance to warrant the trial judge taking any such action on his own volition.

Defendant asserts it was error to deny a motion to strike the testimony of the State's witness, Mitzi Faulk. In order to place this issue in tis proper context, we consider it beneficial to summarize the material evidence from the record.

Mitzi Faulk was the six-year-old daughter of Joy Faulk, one of the victims. The child and her three-year-old sister were passengers in the pickup truck owned by Charles Browning at the time he and her mother were purportedly shot by the defendant. The young witness was called to testify on behalf of the State. No challenge was raised prior to, or during, her testimony for any reason. It would be unnecessarily burdensome to repeat all of the testimony of the witness. It is sufficient to say that direct and cross-examination comprised some fifty-odd pages of the record. As related in the State's briefs, she demonstrated a remarkable ability to recall the events which occurred with specificity and to articulate detailed descriptions of the defendant, the clothing he wore, his personal appearance, the description of his vehicle and the various circumstances of the homicide. She also testified in some detail about events and conditions transpiring after the homicide occurred, although it was obvious from the testimony of other witnesses that at the time she was in a highly emotional state. The things she stated were corroborated by other witnesses who related res gestae statements made by the child immediately after the crime occurred, and by physical evidence wich fully supported here testimony. Defense counsel subjected the child to an intense and comprehensive cross-examination which involved her in what could have been construed as contradictions of her testimony. The trial judge allowed testimony of other witnesses to bolster the testimony of the child on the theory that her statements to them were spontaneous utterances and that her credibility had been impeached to some degree.

Defendant's attack on the admission of the testimony of this witness is two-fold. In the trial court, he moved to have the evidence stricken on the basis that the witness had been com-

pletely discredited and impeached and, on the basis that the State did not attempt to qualify her by showing her knowledge or understanding of the duty of an oath.

In this Court, it is first argued that the rule in Tennessee, as stated in *Ball v. State,* 188 Tenn. 255, (1948), is that a child under the age of fourteen (14) is not presumed competent, although a child of any age may be competent if possessed with the mental capacity and memory sufficient to be able to give a reasonable and intelligible account of the subject matter of his testimony. Also, he must have a reasonable appreciation of the difference between right and wrong, and comprehend the character, meaning and obligations of an oath. Defendant cites *Ball* specifically to assert the principle that "it is the duty of the court to examine the child witness in order to ascertain if he or she is competent." It is defendant's contention that under the authority of Ball, the trial judge had an affirmative duty to examine the child in this case and determine her competency based upon the criterion set out in that opinion. There is no doubt that this issue would have been resolved had the trial judge in this case proceeded with the examination of the witness before allowing her testimony, however, we do not agree with the insistence on behalf of defendant that the pre-testimonial examination is mandatory to establish a witness' competence, or that the trial judge should have launced such an examination sua sponte without some request for such an examination on behalf of the defendant. In *Vincent v. STate,* 50 Tenn. 120, (1871), cited by the *Ball* court, it was said that at the age of fourteen (14) years, a witness is presumed to have sufficient discretion and understanding to testify; under that age, such presumption does not arise; but the judge *usually* examines him to ascertain the degree of his understanding; and if the witness manifests, in the opinion of the judge, sufficient natural intelligence and understands the nature and obligation of an oath, he may be examined, whatever may be his age. (Citations omitted). In *Bright v. State,* 232 S.W.2d 53, (Tenn. 1950), the court made this comment:

> "It is next assigned as error that the Trial Judge made inadequate examination of the boy, Lloyd Harris, before allowing him to testify. Bearing in mind that the boy had testified on the first trial, after an examination which is not in the present record, and that at the time of the second trial, he was older and more mature, we cannot find any indication of any abuse of discretion by the Trial Judge, whose exclusive province it was to determine the capacity of the witness tendered, and in the absence of timely objection (the defendants made no objection in the present record), adequate examination and capacity to testify will be presumed. Logston v. State, 50 Tenn. 414; Burke v. Ellis, 105 Tenn. 702, 58 S.W. 855."

In *Burke v. Ellis,* 58 S.W. 855, 105 Tenn. 702 (1900), the issue was addressed in these words:

> "It is said the Court should have charged the jury, upon request made, that the child, being only seven years of age, was incapacitated to testify in the case. No objection was made to the child's testifying when he appeared as a witness, and the Court was not requested to test his capacity, and, it appears, was ocntent to let him give his statement. We must infer that the Court was satisfied, from his appearance, manner, and the matter of his testimony, that he was competent and intelligent enough to give his statement."

In *Franks v. State,* 213 S.W.2d 105, 187 Tenn. 174 (1948), our Supreme Court had this to say on the issue of the competence of a seven-year-old child:

> "It is next insisted that the trial judge was in error in permitting the seven-year-old daughter of deceased to testify. This little child was examined by counsel and upon her examination, in answer to a question as to what becomes of children who do not tell the truth, made the statement that they did not go to Jesus. We think this evidence shows a

> recognition of a state of future punishments and rewards. We have no case in this State directly in point, but we quote from the case of Wheeler v. United States, 159 U.S. 523, 525, 16 S.Ct. 93, 40 L.Ed. 244, 247, as follows: 'The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous.' . . .
>
> ". . . In the present case, the trial judge had the little girl before him and uld judge of her intelligence. After all, the personal observation of a child of tender years furnished the safest guide to its ability to testify, and we are of opinion that the trial judge did not abuse his discretion in permitting the little girl to testify."

In *Arterburn v. State* 391 S.W.2d 648, 216 Tenn. 240, our Supreme Court explicitly said:

> "Where no objection to the testimony of a child is made, adequate examination of the child and capacity to testify will be presumed and the trial judge will not be put in error for refusing a special request to charge that due to the youth of the witness he was incapacitated to testify. *Bright v. State,* 191 Tenn. 249, 232 S.W.2d 53 (1950); *Burke v. Ellis,* 105 Tenn. 702, 58 S.W. 855 (1900)."

We have spoken about the character of the testimony of the witness under the first test of her competency, that is her intelligence, her ability to recall and relate accurate impressions of the facts to which her testimony related, as well as her obvious candor in responding to the questions put to her. We are equally satisfied with her sensitivity to the obligation to tell the truth

under oath. We have assiduously reviewed the record where contradiction in her testimony occurred. It is plain that much of this occurred as the result of the nature of the examination by defense counsel. Her answers, where they appeared contradictory, were susceptable of different interpretations. The mere fact of the contradictions as they existed, did not render the testimony incompetent, or inadmissible, but goes only to her credibility. We find, as did the court in *Logston v. State, supra,* the witness, Mitzi, to be a competent witness. In the Logston case, the court made these comments:

> "James Galloway, a witness, about eight years of age, was objected to because of his tender years and for want of proper instruction. The court asked the witness if he knew what would become of him if he swore a lie? He said, 'Yes, the bad man will get me.' He was then asked who told him so. He said his mother. While, as a general rule, it might have been proper to have further tested the witness, yet, in view of his remarkably intelligent testimony, we are satisfied the manner of the child was of a character to satisfy the court of his capacity and instruction, and justified the brevity of examination by the court. The sensible answers make it clear that the witness understood sufficiently the nature of an oath and had a well defined idea of future rewards and punishments. His candor in speaking of his testimony, given on former trials, discovers an honesty the absence of which in many older and more mature persons, is to be regretted."

Defendant objected at the trial level to the restriction of his cross-examination of the child witness, Mitzi Faulk. It appears that in the course of his cross-examination, he endeavored to inquire from the child relative to an alleged charge of sexual abuse by her father, Sam Faulk, on the theory that Sam Faulk had committed the homicide of his former wife and Charles Browning as a result of those charges. The trial judge ruled that he could pursue this theory of the defense through other witnesses

but not through cross-examination of the child. Defense counsel's citation of *Green v. State,* 154 Tenn. 26, 285 S.W. 554 (1926) is correct. It is a legitimate defense tactic to show that another had perpetrated the crime for which he was accused and introduce any proof legitimate to establish that fact which would be legal against the individual if he had been on trial for the offense. However, the trial judge did not deny defendant the privilege of introducing any evidence whatsoever of that nature, but merely limited him in his cross-examination of the six-year-old child about sexual molestation by her father because it would be detrimental to her. The scope of cross-examination is a matter of discretion on the part of the trial court subject to reversal only if the Appellate Courts find plain abuse of that discretion. *Evans v. State,* 557 S.W.2d 927, Tenn. Crim. Appeals (1977). We do not find such abuse of discretion.

It is complained the court erred in failing to require the State to produce statements of witnesses and/or failing to grant sanctions against the State for not doing so.

The first reference in the record relative to this issue appears to be in regard to the testimony of the witnesses Jennie Browning and Junior Davis. In reviewing this issue we note the trial judge earlier had made the comment, in reference to the possible existence of a statement of a witness, that Rule 16 did not apply if the District Attorney General had never had such a statement in his possession. We certainly do not believe His Honor meant to imply that a statement appropriate for discovery was not in the State's possession simply because it was still physically held by a Peace Officer witness.

At the conclusion of the State's examination of the witness, Jennie Browning, defense counsel began cross-examination without moving for production of any statement of the witness in the State's possession relating to the subject matter of her direct testimony. Shortly after he began cross-examination, he inquired of her if she had given a statement to the police. Upon an affirmative reply, counsel requested to see the statement.

The District Attorney General presented to the court the notes of the conversation between the witness and several law enforcement officers who were engaged in conversation with her. The court directed these notes be made available to defense counsel, and copies made for his use.

Defendant claimed a violation of Rule 16(a)(1)(A) and (E). We find no merit to his complaint. We have experienced some difficulty in analyzing this complaint because of failure of counsel to make appropriate references to the record in accordance with Rule 27 of the Rules of Appellate Procedure. However, regarding defendant's assertion of error in denial of a mistrial based upon the failure of the State to reveal or make available to defense counsel in advance of trial any statements alleged to have been made by defendant, we have not been able to determine from this record that any such statement was made by the defendant. The same is equally true regarding defendant's request for statements made by Jennie Browning and Junior Davis. There were no statements, which could be defined as such under Rule 16, taken from either of these witnesses. The trial judge allowed defense counsel to examine the investigating officer's notes taken during conversations with Mrs. Browning. The District Attorney General informed the court he did not have any notes relating to the interview with Mr. Davis. The court ruled that work notes were not subject to the disclosure rule. We reiterate for the benefit of Bench and Bar that if any relevant, written, or recorded statements coming within the scope of the Rule are in the possession, custody or control of the State, whether in the hands of the District Attorney General, or some other investigating officer, they are subject to the Rule and must be produced.

We also overrule defendant's complaint of error due to comments made by the trial judge in the course of the trial. As our Supreme Court said in *Brooks v. State*, 213 S.W.2d 7, 187 Tenn. 67 (1948), "A trial judge should be very careful and not give expression to any thought that would be calculated to lead

the jury to infer that his opinion was in favor (sic) or against the defendant in a criminal trial." In this case, the learned trial judge made a comment that does not merit repetition because it was not the sort of statement which was likely to influence the jury. He subsequently explained to the jury the reason for his remarks, apparently to assure that they were not improperly influenced by what he had said. We find no prejudice to the defendant.

Defendant claims that the trial judge allowed the prosecutor to elicit testimony concerning defendant's statements to the State psychiatrist but denied defense counsel the opportunity to cross-examine on the same matter. Defendant complains of examination of its expert witness by State's counsel relative to events which occurred earlier in the day of the homicide. The trial judge ruled that neither the State nor the defense would be permitted to admit into evidence anything defendant told a doctor relative to the crime itself. Subsequently, defense counsel endeavored to cross-examine the psychiatrist relative to the truth of defendant's statements about the period of time the homicides purportedly took place. The trial judge properly limited the cross-examination in that regard. He properly ruled that if defense counsel opened the door, the State would be permitted to also inquire about defendant's statements concerning the time of the homicides. We find no error in this ruling.

Prejudicial error is attributed to the District Attorney General in his closing argument. In cross-examination of a State witness, Sylvia Hillis Barrett, defense counsel couched his questions in professional terms and received responsive answers from the witness. In his closing argument, the District Attorney General commented about the similarity between her answers and those given by an expert psychiatrist and he speculated on how she could be so informed. The comment was improper. There was no indication the witness had been coached. However, the argument followed the evidence and we find no prejudice to the defendant. We find that the comments did not

improperly affect the jury verdict. See *Judge v. State*, 539 S.W.2d, 340, (Tenn. Crim. Appeals 1976); *State v. Sutton*, 562 S.W.2d 820, (Tenn. 1978).

The second comment about which complaint was made was obviously an inadvertent statement on the part of the State's attorney where he confused the words defendant and witness. It certainly did not prejudice the jury.

We note in the first instance that there was no simultaneous objection; ultimately, defense counsel did raise an objection, however, he declined to have the court to give an appropriate instruction. We do not find any prejudice to the defendant from the remark.

The remainder of the issues raised are in reference to the jury instructions. First, the defendant submitted numerous instructions, a number of which related to the insanity defense and diminished capacity on the part of the defendant, which would negate his ability to form the requisite intent for a finding of First Degree Murder or the malice required for the commission of Second Degree Murder. We have examined defendant's brief and find it refers specifically to six (6) of the special requests. Of these, we find that four (4) are improper statements of law, and the other two (2) were covered adequately in the general instructions to the jury delivered by the trial judge. A specially requested instruction shall not be given unless that request is trictly accurate as to the law and applicable to the facts and issues in the case. *Cooper v. State*, 138 S.W. 826, 123 Tenn. 37, (1911). *Raine v. State*, S.W. 189, 143 (Tenn. 168, (1928). There is no error in denial of a requested instruction which is covered by the court's general charge. See *Edwards v. State*, 540 S.W. 2d 641 (Tenn. 1976); *Crafton v. State*, 545 S.W.2d 437 (Tenn. Crim. Appeals 1976). The trial judge properly and adequately instructed the jury on all of the elements of the insanity defense and we do not find error in the instructions.

Defendant complains of the jury instruction on the failure of one to produce a witness who was solely available to that party.

Initially we note that defendant failed to make a contemporaneous objection to the instruction, which constitutes a waiver of the issue. See *Pope v. State,* 528 S.W.2d 54, Tenn. Crim. Appeals (1975); *Mellons v. State,* 560 S.W.2d 634, (Tenn. Crim. Appeals (1977). Nonetheless, the jury instruction was wholly impartial and did no more than inform the jury that the failure of either the State or the defendant to call a witness who was peculiarly available to that particular party could raise an inference that the absent witness' testimony would be adverse. Such an inference is permissive and does not raise any mandatory requirement on the part of the jury. We do not find error.

Defendant also raises the question of the jury instructions concerning the presumption of malice. He says the instruction given by the court shifted the burden to defendant to rebut the presumption of malice. It is contended this procedure allowed the jury to determine the element of malice upon defendant's failure to rebut the presumption rather than upon the evidence, and this was a denial of due process. *Sandstrom v. Montana,* 442 U.S. 510, 99 Supreme Court 2450, 61 L.Ed.2d 39 (1979) is the authority upon which defendant relies. Sandstrom was a case in which the State Court Judge instructed the jury that a person is presumed to intend the ordinary consequences of his voluntary acts. The United States Supreme Court held that because the jury may have interpreted the presumption as conclusive or as shifting the burden of persuasion, and because either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt, the instruction given was unconstitutional. We do not have such an instruction in this case. The Trial Judge in this case, specifically instructed the jury that the defendant is presumed innocent, and the burden is on the State to prove his guilt beyond a reasonable doubt. He reiterated in several instances that the burden of proof was upon the State and the measure of the evidence was

beyond a reasonable doubt. Upon the specific element of malice, the jury was particularly instructed:

> "The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all of the facts and circumstances developed by the evidence to determine whether the State has proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the alleged killing was done with malice, then the defendant cannot be guilty of murder . . . and you must acquit him of that offense."

As this court said in *Armes v. State*, 540 S.W.2d 279, (Tenn. Crim. Appeals 1976):

> "The instruction complained of merely told the jury that the use of a deadly weapon in a homicide raised a presumption of malice which would support a verdict of second degree murder unless other facts and circumstances rebutted this presumption. This instruction did not place upon the defendant the burden of proving the absence of malice. Unlike *Mulaney*, (Mulaney v. Wilbur, 421 U.S. 684, 95 Supreme Court 1881, 44 L.Ed.2d 508 1975), the charge placed no burden upon the defendant to prove any element of the offense. It did not require the defendant to present other facts and circumstances, or any evidence to rebut the presumption. Certainly, the jury could consider any proof offered by the defendant and/or his witnesses in deciding if the presumption had been rebutted, but it also could look to all the State's direct proof, the proof elicited upon cross-examination of the State's witnesses, and every other fact and circumstance in the case in deciding the issue."

The presumption stated by the trial judge is not the sort of inference adjured against in Sandstrom, supra, or any of its predecessors. It is a form utilized in criminal cases, created in the common law, to provide guidance for juror's thinking in

considering the evidence laid before them. See *County Court of Ulster County v. Allen,* 442 U.S. 140 99 Supreme Court 2213 60 L.Ed.2d 777 (1979), Powell, Justice, dissenting.

There is a further reason why there is no basis for defendant's complaint with the jury instructions on this issue which is brought out in his appellate brief. His defense was that he did not commit the crimes, had no knowledge of the events whatsoever, and to the contrary, he sought to show through cross-examination of the State's witnesses that the crime was actually committed by the former husband of the woman victim. He offered medical evidence to show that he was not guilty by reason of insanity. This defense was a valid one, and if accepted by the jury, precluded any guilt on his part whatsoever.

We are constrained to say that defendant has been very ably and competently represented in this case, however, we do not find error in the trial proceedings and affirm the judgment of the trial court.

CHARLES H. O'BRIEN, JUDGE

CONCUR:

Martha Craig Daughtrey, Judge

Jerry Scott, Judge

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Rutherford County
C.C.A. No. 79-106-III

State of Tennessee,
Plaintiff-Appellee,

v.

Stanley Barham Clark,
Defendant-Appellant.

ORDER

Upon consideration of the application for permission to appeal filed by the Appellant and the answer of the Appellee, the briefs of counsel and the entire record, the Court is of the opinion the application for permission to appeal should be and the same is hereby denied. We concur in the decision of the Court of Criminal Appeals in result only.

Costs will be borne by the Appellant.

PER CURIAM

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

FILED
JUL 29 1985

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER

v.

STANLEY BARHAM CLARK, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals was not reported but is included as Appendix A to the Petition for Writ of Certiorari. The opinion of the District Court is likewise unreported and appears as Appendix B to the Petition for Writ of Certiorari. The opinion of the Tennessee Court of Criminal Appeals of the Court's judgment was filed on February 27, 1981, and was unreported but appears as Appendix C to the Petition for Writ of Certiorari. The unpublished Order of the Supreme Court of Tennessee, denying discretionary review, was filed on November 30, 1981, and appears as Appendix D to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 1, 1985.

The Petition for a Writ of Certiorari was filed on May 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner (i.e. State of Tennessee) seeks to have this Court set aside the judgment of the U. S. Sixth Circuit Court of Appeals which affirmed the decision of the United States District Court for the Middle District of Tennessee which granted respondent, Stanley Clark, habeas corpus relief setting aside his conviction and life sentence for first degree murder and ordering that he be granted a new trial (Pet. Appendix A, B, C, D). The respondent in his petition for habeas corpus relief to the District Court had raised several constitutional issues, but the District Court pretermited and did not determine any issues other than those dealing with the accused's contention that jury instructions dealing with the presumption of malice violated defendant's due process rights under the Fifth and Fourteenth Amendments by impermissibly shifting the burden of proof on that issue to defendant effectively requiring him to disprove malice which was an essential element of the crime for which he is convicted, in violation of the principles enunciated in the U.S. Supreme Court decision in Sandstrom v. Montana, 442 U.S. 510 (1979).

Petitioner (i.e. State of Tennessee) now asks this Honorable Supreme Court to reverse the U.S. District Court and Sixth Circuit Court of Appeals based upon the State's contentions that the State Trial Court's jury instructions on malice did not impermissibly shift the burden of proving malice to the respondent and that any error in the Court's jury instructions on malice was

harmless beyond a reasonable doubt (Pet. A.).

DISCUSSION

It is proper to note at the outset that the statement of case and the factual assertions contained in the petitioner's Petition for Writ of Certiorari reflect a one-sided view of the evidence and failed to give a proper view of what actually was presented at the trial. In particular, respondent would show as follows:

A. First, petitioner asserts that a police officer observed a brownish-colored pickup truck belonging to Stanley Clark in the general vicinity of the homicide, when in fact, the officer simply noticed a vehicle of that color following another vehicle five to ten miles from where the shootings occurred and the officer acknowledged that this occurred at night on an unlighted country road, and he did not pursue the vehicle since there was no apparent crime or offense being committed and he could not identify the occupants of either vehicle, did not obtain any license number of specific identification of the vehicles, and was only "assuming" that the vehicles he had seen earlier, in fact, belonged to the defendant and the victims (Tr. 83-86).

B. The bodies of the deceased -- Joy Faulk and Charles Calvin ("Charlie Sue") Browning -- were discovered in Browning's pickup truck parked in front of the trailer home of Jef Faulk on Threet Road in Rutherford County, Tennessee, on the night of December 30, 1978 (Tr. 34, 45-46).

C. The two minor children, Mitzi Faulk, age 6 and Michelle ("Shelley Bean") Faulk, age 3, the daughters of Sam Faulk, were found by the side of the road a considerable distance from the scene of the incident by

passersby Mr. and Mrs. Marion Smith about 9:30 to 10:00 that same night (Tr. 257).

D. According to Mr. Smith, the children did not name who had done the killing, but the oldest of the two girls, Mitzi, said: "She said they were fighting, they had guns. Her mother had been shot or killed. And I asked her who she was . . ." (Tr. 306, 315-316).

E. Mr. Smith's wife, Mary, originally testified consistent with Mr. Smith at the preliminary hearing (Tr. 269-280).

F. Upon trial, however, her story changed and she suddenly had recollection that Mitzi had said:

1. "Charles and Clicker have got guns." (Tr. 299).

2. "Clicker shot my mother." (Tr. 299).

G. Under cross-examination by defense counsel, Mrs. Smith admitted that when she testified previously that she had testified that the child did not say who shot her mother, but now says that the child did mention someone, the defendant (Tr. 269-280).

H. In this testimony, Mrs. Smith acknowledged that she was hostile to even coming to Court and that her testimony had changed from hearing to hearing, based upon her feelings about the matter, such as the manner in which she was subpoenaed to come to Court (Tr. 272-274, 278-281).

I. Records of the Rutherford County Sheriff's Office indicated that the complaint call which caused the investigation of this matter was received by Lt. David Garant and indicated that Mr. Bill Hackney had called at 10:12 p.m. (Tr. 890), stating "two juveniles came to Mr. Hackney's house saying their father shot someone." (Tr. 890-891).

J. The testimony of the child, Mitzi Faulk,

demonstrated that she had no real conception of the meaning of an oath and that her testimony was very unreliable. As the Trial Judge said to defense counsel, "You so successfully contradicted her stories with your cross-examination that her credibility has been impeached, . . ." (Tr. 256).

K. One of the victims was found to have a gun in his pocket (Tr. 155) and the investigating officers found a fifth bullet cartridge or shell that did not come from the murder weapon, but the police lost this fifth shell so that no ballistics could be performed upon it (Tr. 173-174).

L. Lt. David Garant of the Rutherford County Sheriff's Office testified that he took the incoming complaint call and made the record of the call which showed that Mr. Hackney had called and said that two juveniles appeared at his home and said their "father" had shot someone (Tr. 890-891).

M. Sylvia Hillis Barrett testified on behalf of the State that she was with the defendant on several occasions during the days immediately prior to the shooting. On cross-examination the defense brought out through the testimony of Mrs. Barrett that for some months prior to the homicides, the petitioner had engaged in strange behavior; he had acted as if he really didn't know what he was doing; had lost some 35 pounds in weight; could not even sleep; was bothered by his reminiscences of his experiences in Vietnam; could see in his dreams Vietnamese people coming at him; was greatly depressed; acted as if he were a different person; grew progressively more quiet; and was very withdrawn; and was upset physically and depressed emotionally (Tr. 521-525).

N. Two psychiatrists testified for the defense. The defense psychiatrists were Dr. John Griffin

and Dr. Roger White (Tr. 789-850, 850-887), both of whom testified that they had examined the defendant and that if, in fact, defendant was present at the incident wherein the victims were killed, he has no conscious memory of it (Tr. 800-801, 860-862). They also both stated that because of his long standing depressive neurosis which had markedly worsened just prior to the incident, defendant was, at that time, unable to conform his conduct to the requirements of law because of his depression (Tr. 799, 859-860). They affirmed that if defendant was present at the shootings he has no recall or memory of it, despite attempts to unlock his memory by "truth serum an hypnosis", but has suppressed them completely (Tr. 840-841, 860-862). On cross-examination the State brought out that the defendant had stated to Dr. Griffin that on the day the death occurred the defendant stated he had consumed 36 beers and a quantity of vodka (Tr. 814-815).

O. At the outset of the trial before any proof was even introduced, defense counsel in his opening statement specifically stated to the jury that even if they found the accused was, in fact, the one who shot the victims, nevertheless defense would show that the accused has amnesia and has no recollection of the events and "That due to his mental condition he could not have possessed the mental capacity required to establish his guilt" (Tr. 24).

P. At the close of all of the evidence the Trial Judge stated "The principal issue here as the Court discerns it after three an one-half days of trial, is who killed these people, or if this defendant did what was his state of mind?" (Tr. 763).

Q. Throughout the presentation of the evidence for the defense, the Trial Judge inquired of counsel as to

whether he should charge the jury on all four degrees of homicide (Tr. 774). Defense counsel requested him to do so and stated "That the appropriate charges that if you find the defendant killed while suffering from a mental disease or defect so great as to render him unable to formulate a specific intent or to harbor malice, but not so great as to render him insane, is voluntary manslaughter" (Tr. 774). The Trial Judge further recognized that proof regarding intoxication had been introduced and asked defendant's counsel if he desired an instruction concerning the effect of intoxication upon the mental elements of the defense and defense counsel requested that the jury instruction be given (Tr. 776).

REASONS FOR DENYING THE WRIT

1. The Court of Appeals correctly held that the Trial Court's jury instruction on malice impermissibly shifted the burden of proving malice to the respondent.

Petitioner in its brief contends that the Sixth Circuit has misapplied the holding of this Court in Sandstrom, contending that the challenged instructions when taken in context with other jury instructions did not impermissibly shift the burden to defendant on the issue of malice. Even a cursory examination of the actual instruction given, however, clearly shows how untenable this argument actually is. In its charge to the jury the Court instructed as follows:

> "All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the state has proven beyond a reasonable doubt that the killing has occurred, then it is presumed that the killing was done maliciously. This presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the

> same be offered by the defendant, or exists in the evidence of the state" (Tr. 1087, 1088).

The Court likewise charged the jury:

> If it is shown beyond a reasonable doubt that the victims were killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption" (Tr. 1084)." [1]

The Sixth Circuit rejected the State's argument based upon the language of Sandstrom and its own prior decision in Phillips v. Rose, 690 F.2d 79 (6th Cir. 1982). The Court noted that part of the instructions given in the present case is similar to those given in Phillips and the Sixth Circuit summed the matter up aptly,

> "Appellee argues that the error, if any, was cured by another jury instruction in this case which directed the jury to consider all the evidence in reaching a verdict. We find this argument unpersuasive. We find the instructions in question hereto run afoul of Sandstrom, and that Phillips is also persuasive, because the intent of petitioner, and any other defenses raised by him relating to his mental capacity at the time, were very much at issue." (Pet. A-4).

There is simply no rational basis for the State's contention that a jury instruction which tells the jurors that all homicides are presumed to be malicious and that if the State has proven beyond a reasonable doubt that the killing has occurred, then it is presumed that the killing was done maliciously, would not have a burden-shifting

---

1/ Although the failure of the defendant to object to the jury instructions at the trial has never been an issue in these proceedings, and the Court of Appeals correctly noted that the Tennessee Appellate Court did not rely upon any procedural default but rejected petitioner's constitutional challenge on its merits, (Pet. A-3), in fact, there was no procedural default since the instructions issue was raised by defendant in his motion for new trial and under Tennessee Rules of Criminal Procedure 30(b) dealing with objections to jury instructions, it is specifically provided that "failure to make objections shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for new trial."

affect simply because it was stated that the presumption could be rebutted and there was an additional general jury instruction to the effect that the State has the burden of proving each element of the crime beyond a reasonable doubt. Indeed, the instruction in question is drafted in such a fashion as to clearly indicate the intent of the Court to shift the burden to the defendant to rebut the presumption of malice in accordance with the long standing Tennessee authorities which pre-dated Sanstrom. As stated by the District Judge, whose opinion was affirmed by the Sixth Circuit,

> "The respondent argues there was no Sandstrom deficiency here because the trial-judge instructed the jury also that the burden was on the State to prove the existence of malice beyond a reasonable doubt and that the jury should consider all the facts and circumstances in determining whether the State had met such burden. This very argument was rejected in Phillips v. Rose, supra, because these additional instructions are not inconsistent rhetorically with the existence of a burden-shifting presumption, since a reasonable juror could have regarded the presumption of malice as a means by which proof of malice beyond a reasonable doubt could be satisfied. Id., 690 F.2d at 81; accord: Engle v. Koehler, supra, 707 F.2d at 245.

> Under the instructions given by the trial-judge, the jury could have understood reasonably that the prosecution could meet its burden of proving the element of malice merely by showing that a killing had occurred; that once the State demonstrated a killing, malice was presumed, and it then devolved upon Mr. Clark to negate the existence of such element . '***Such an instruction effectively shifts the burden to the defendant of disproving an element of the crime. This is constitutionally forbidden.***' Krzzeminski v. Perini, supra, 614 F.2d at 124-125; accord: Lockett v. Arn, supra, 728 F.2d at 272 ('Such a presumption forces the defendant to assume the burden of disproving an essential element of the crime.') (Pet. A-14, 15).

2. The Sixth Circuit Court of Appeals correctly applied the harmless error doctrine to the facts of this case.

The petitioner (i.e. State) asserts that the error created by the instructions was harmless. The Sixth Circuit Court of Appeals agreed with the District Court's finding:

> "Accordingly, we agree with the trial court in this case that there was a Sandstrom violation inherent in the instructions given by the Tennessee trial court, and that in this murder case involving a defense of lack of mens rea, the error was not harmless beyond a reasonable doubt, despite the substantial evidence of petitioner's guilt presented to the jury." (Pet., A-6).

As the District Judge stated in his thorough evaluation of the effect of the error:

> In this Circuit,
>
> > • • • the prejudicial effect of a Sandstrom instruction is largely a function of the defense asserted at trial. If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a Sandstrom instruction may be harmless. Conversely, if the defendant asserts lack of mens rea, a Sandstrom instruction can be extremely prejudicial even if overall proof of intent or malice is substantial. • • • " (Emphasis added). (Pet., A-15.

16).

After applying that rule, the Court then concluded,

> "Clearly, this is not a situation where the defendant acknowledged at trial that an intentional, malicious killing had occurred and only claimed non-participation therein. Instead, Mr. Clark's defense accented both the physical and mental elements of the offenses charged. His defense was threefold: (1) that he did not commit the killings and knew nothing about them; (2) that, because of mental-illness and voluntary intoxication, he was not guilty; and (3) that, even if the jury should find the existence of all elements of the crimes, he should be found not guilty by reason of insanity.
>
> From the outset of the trial, it was clear that the defense was unlikely to concede anything, rather that it intended to put the State to its burden of proving beyond a reasonable doubt every element of the offenses charged, physical as well as mental. The reliance on a mens rea defense, in addition to the claim of non-participation, was evident throuthout the entire trial:" (Emphasis added). (Pet., A-16, 17).

The Judge thoroughly analyzed the record and noted that the defendant (1) raised the issue of mens rea in his opening statement at the outset of the trial, (2) brought out evidence on cross-examination of the State's witness showing that the defendant had engaged in strange behavior, was experiencing mental problems and was upset physically and depressed emotionally, (3) noted that the Trial Judge himself recognized after the State had rested its case in chief, that "the principal issue here as the Court discerns it after three and one half days of trial, is who killed these people, or if the defendant did what was his state of mind", (4) noted that defense counsel requested that the Judge charge the jury concerning defendant's ability to formulate specific intent to kill or to harbor malice, (5) that defense counsel requested that a jury instruction be given concerning the effect of drunkness on defendant's mens rea, (6) noted that the defense called two

psychiatrists who testified that defendant's mental illness was such that it rendered him substantially incapable of conforming his behavior to the requirements of law, (7) called a psychiatrist who acknowledged that the defendant had informed him that he had consumed six six-packs of beer plus a quantity of vodka on the date the killings ocurred, (8) called a second psychiatrist who diagnosed the defendant as having a serious and rather long-standing depressive neurosis as a result of which defendant could not conform his behavior to the requirements of the law and (9) that each of these doctors supported petitioner's claim that if, in fact, he committed the offense he had no recollection of the offense of that day due to amnesia. (Pet., A-17, 18, 19).

In view of the District Judge's diligent analysis of the harmless error doctrine and his extensive review and application of the facts of this case to that doctrine, and the concurrence of the Sixth Circuit in the conclusion that the error was not harmless, there simply is no basis for the State's harmless error argument. It is even more difficult to understand how the State could, at page 11 of its petition, state that "the appellee basically acknowledged that the murders were committed in a malicious manner." This is absolutely untrue and as the District Judge specifically noted, supra, "From the outset of the trial it was clear that the defense was unlikely to concede anything rather that it intended to put the State to its burden of proving beyond a reasonable doubt every element of the offenses charged, physical as well as mental." There is simply no basis for petitioner's assertion that the defendant by an insanity defense under the circumstances of this case acknowledged the elements of the crime; in fact, the defendant contested every element and

every proposition of fact raised by the prosecution.

Defendant contested not only the issues of insanity but indeed the issues regarding how and why the crime was committed and specifically suggested that if, in fact, the accused did shoot the victims it was as a result of a fight and brought out to the jury that the child witness to the events had stated "They have guns; and they are fighting," (Tr. 306, 315, 316, 998, 1051) and that a fifth shell was found at the scene by the police which would indicate that another shot was fired by someone other than the defendant (Tr. 1051) and one of the victims was found to have a pistol in his pocket (Tr. 155) and that the defendant's counsel throughout his closing argument to the jury repeatedly asserted that the defendant was not required to prove he was innocent and due to his amnesia could not tell what happened even if he had been at the scene and that "I submit to you if you have a reasonable doubt about any aspect of this case that is material and that the prosecution has to prove, then it is your duty to find the defendant not guilty." (Tr. 1049, 1050).

Furthermore, the State actually sought to shift the burden to the defendant and the District Attorney took full advantage of the improper presumption by stating in his closing rebuttal argument,

> "You are justified in finding willful, deliberate, malicious and premeditated murder. There has been no proof whatsoever to the contrary, that this was not a first degree murder" (Tr. 1071).

Under such circumstances it is inconceivable that the State could reasonably claim that defendant had acknowledged the murders were committed in a malicious manner or that the defense acknowledged the elements of the crime or that the error was harmless.

3. Evidence of defendant's consumption of vast

quantities of alcohol was a proper subject or circumstance for consideration by the jury on the issue of defendant's mental state or mens rea.

The State further contends that the Trial Judge misintrpreted Tennessee law concerning voluntary intoxication; this too is an incorrect statement of the facts and Tennessee law. The State itself during its cross-examination of the defense's psychiatrist brought out substantive evidence of intoxication by way of an admission by the defendant in an apparent attempt to prove that defendant's amnesia was a result of intoxication rather than insanity (Tr. 814-815), and the State can hardly complain about evidence the State itself introduced into the record. At any rate, whatever the purpose of the State's cross-examination, it clearly introduced the evidence of defendant's consumption of vast quantities of alcohol on the day in question and was sufficient to convince the Trial Judge to charge the jury concerning intoxication. (Tr. 776).

Furthermore, under State v. Adkins, 653 S.W.2d 708 (Tenn. 1983) a case in which the evidence showed that the defendant spent most of the day of the killings drinking beer with various persons and had consumed about 24 bottles of beer that day, the Court there stated,

> "Voluntary intoxication is never a justification for a crime, but its existence may negate a finding of specific intent. State v. Bullington, supra, at 560. If the accused is so intoxicated that he is incapable of forming a premeditated and deliberate design to kill, he cannot be guilty of murder in the first degree; and even when an intoxicated defendant is capable of forming a specific intent, his drunkness may be considered in determining whether he specifically intended the particular act for which he is on trial. State v. Bullington, supra." (Underscoring added).

And under the decision of State v. Taylor, 668 S.W.2d 681 (Tenn. Cr. App. 1984),

> "Malice is an intent to do any injury to another, a design formed in the mind of doing mischief to another."

Thus, under Tennessee law to prove malice whether actual or implied requires a finding of intent to do injury to another and intoxication, or the effect of alcohol, (particularly when coupled with depression or mental illness) can be considered in determinng whether or not the defendant was capable of forming a malicious intent or "a design formed in the mind of doing mischief to another". The jury obviously was entitled to consider anything which could have affected the mental state of the accused in determining whether he was capable of forming the intent necessary to establish malice, and "in determining whether he specifically intended the particular act for which he is on trial"." Clearly, the Trial Judge properly recognized the right of the jury to consider the evidence of intoxication, together with the other evidence reflecting upon defendant's mental state on the issue of the intent required to formulate malice, and the District Court and Sixth Circuit properly held that the evidence of his strange behavior, depression, intoxication and insanity related to the defendant's mens rea concerning malice.

4. The District Judge did not mis-apply the law regarding amnesia.

The State contends that the Court misinterpreted Tennessee law concerning appellee's claim of amnesia and that amnesia is not a defense to the crime under Tennessee law. This assertion at page 12 of the State's petition illustrates once again how the State simply overlooks or disregards what the Court found and stated. Nowhere did the Sixth Circuit Opinion ever mention the word "amnesia"

much less state that it was a "defense". Likewise, the District Judge nowhere stated that amnesia was a defense, but rather he simply pointed out that defendant's claim of amnesia was supported by the doctor's testimony and that it was relevant insofar as it reflected upon his state of mind. (Pet. A-19,20). Certainly, the defendant never conceded that his actions, even if he had, in fact, killed the victims, were malicious or intentional, since he had absolutely no recollection of the events. As pointed out above, defendant sought to show that if, in fact, he participated in the events, the deaths were not malicious but were the result of a fight and his mental illness and intoxication. The State thus raises a non-issue.

5. The weight of the evidence on the issue of malice is irrelevant to the issues in this case.

The State next contends that the proof "overwhelmingly established the element of malice" and goes on for several pages in detaling what it asserts as being evidence of malice. However, this ignores the fact that the issue of the sufficiency of the evidence to convict is not at issue in cases such as this, since, as stated by the U.S. Supreme Court in Connecticut v. Johnson,

> "A judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on fact within the condemned instructions . . . or an actual authorization or ratification of such acts . . . a failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction." (Underscoring added).

The Supreme Court there went on to state,

> "An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider the evidence of intent, a reviewing court cannot hold that the error did not contribute to the

> verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made. The Court in Bollenback v. United States, 326 U.S. at 614-615 stated: 'All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished.' See County Court of Ulster County v. Allen, 442 U.S. 140, 160 (1979). ('It is irrelevant in analyzing a mandatory presumption . . . that there is ample evidence in the record other than the presumption to support a conviction.')." (Underscoring added).

Since the defense did not merely claim non-participation but to the contrary contested every element of the charge and contended that even if the defendant shot the victims, the deaths occurred as a result of a fight and that due to the various factors affecting his condition did not possess the mental sate to establish his guilt, the issue of mens rea concerning malice was clearly raised and thus the harmless error doctrine does not apply regardless of the weight of the evidence.

CONCLUSION

Respondent respectfully submits that the petitioner has not presented any valid basis for granting the Writ of Certiorari and that the Petition should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER

v.

STANLEY BARHAM CLARK, RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief Of The Respondent In Opposition To Petition For Certiorari was mailed, postage prepaid, to Mr. W. J. Michael Cody, State Attorney General, and Ms. Kymberly Lynn Anne Hattaway, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025, on this 23rd day of July, 1985.

Scott Daniel

Supreme Court, U.S.
FILED
DEC 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 84-1974

In The
Supreme Court of the United States
October Term, 1985

JIMMY C. ROSE, WARDEN,

Petitioner,

vs.

STANLEY BARHAM CLARK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PLEADINGS and MINUTES ENTRIES

[Indictment filed February 21, 1979]

TRUE BILL

State of Tennessee, Rutherford County
Circuit Court February Term, 1979

The Grand Jurors for the State of Tennessee, duly elected, sworn and charged to inquire for the body of the County of Rutherford and State aforesaid, upon their oaths aforesaid present, that heretofore, to wit: on the 30th day of December, 1978, in said County and State, one Stanley Clark, with force and arms, unlawfully, feloniously, willfully, delibertly [sic], premeditatedly and maliciously, did make an assault upon the body of one Charles Browning and him the said Charles Browning he the said Stanley Clark then and there did unlawfully, feloniously, delibertly [sic], premeditatedly, and of his malice aforethought, kill and murder, against the peace and dignity of the State.

SECOND COUNT:

And the Grand Jurors aforesaid, upon their oath aforesaid, do futher [sic] present: That on the day and date aforesaid, in the county and state aforesaid, the said Stanley Clark, with force and arms, unlawfully, feloniously, willfully, delibertly [sic], premeditatedly and maliciously, did make an assault upon the body of one Joy Faulk, and and [sic] her the said Joy Faulk he the said Stanley Clark then and there did unlawfully, feloniously,

willfully, delibertedly [sic], premeditatedly and of his malice aforethought, kill and murder against the peace and dignity of the State.

/s/ Guy R. Dotson
Attorney General

[Minutes of July 16-20, 1979]

IN THE CIRCUIT COURT FOR RUTHERFORD COUNTY, TENNESSEE

EIGHTH JUDICIAL DISTRICT AT MURFREEBORO

[Caption Omitted]

ORDER

This day comes the Attorney General for the State and the defendant, STANLEY BARHAM CLARK, in proper person and by counsel, SCOTT DANIEL and D. C. DANIEL. When to try the above cause, there comes a Jury of good and lawful persons, to-wit: EDWARD FITZPATRICK, DOYLE WILSON, BILL YEARWOOD, EDWIN TOMMY BIDDIX, MAMIE C. TOMBERLAIN, BILLY R. THOMAS, SARA KELTON, LISA MARIE NICKENS, PARKS HARMAN, WILBUR FRANCIS BREYFOGLE, NORMAN F. COLLINSON, MARGARET ANN PIRMM, MAXINE HENDERSON, 1st Alternate, and RONALD W. CORZATT, 2nd Alternate, who were sworn well and truly to try the issues of traverse herein joined, a true deliverance make and a true verdict render according to the law and the evidence. Thereupon the defendant being arraigned at the bar of the Court and charged on the bill of the indictment pled NOT GUILTY to same and for his trial put himself upon the Country and the Attorney General doth the like.

After the charge was given to the Jury and before said Jury retired to deliberate, for good cause shown, and by agreement of counsel for the defendant and the Attorney General, the alternate jurors in this cause, MAXINE HENDERSON, 1st Alternate and RONALD W. CORZATT, 2nd Alternate, were hereby excused from further service in this cause and participated no further.

After due deliberation the jury returned into open Court, and upon their oaths do say: WE, THE JURY, FIND THE DEFENDANT, STANLEY BARHAM CLARK, GUILTY OF MURDER, SECOND DEGREE, AS TO THE CHARGE IN THE INDICTMENT OF THE MURDER OF CHARLES BROWNING, AND FIX HIS PUNISHMENT AT IMPRISONMENT IN THE STATE PENITENTIARY FOR TEN (10) YEARS.

WE, THE JURY, FIND THE DEFENDANT, STANLEY BARHAM CLARK, GUILTY OF MURDER, FIRST (1st) DEGREE, AS TO THE CHARGE ON THE INDICTMENT OF THE MURDER OF JOY FAULK.

It being the opinion of this Court that the evidence in this cause of the first degree murder of Joy Faulk did not warrant consideration by the jury of whether or not capital punishment should be imposed this was announced to counsel, and, without objection, the jury was discharged and sentence set at life imprisonment.

IT IS, THEREFORE, THE JUDGMENT of the Court that the defendant is guilty of murder, second (2nd) degree, as to the charge in the indictment of the murder of Charles Browning, as found by the jury, and that for said offense he be committed to the State Penitentiary for a period of ten (10) years; that he pay the costs of

this prosecution for which execution will issue; and that he be rendered infamous, incapable of exercising the elective franchise or of holding public office.

IS IT, THEREFORE, THE JUDGMENT of the Court that the defendant is guilty of murder, first (1st) degree, as found by the Jury, as charged under the second count of the indictment, and that for said offense he be committed to the State Penitentiary for life imprisonment: that he pay the costs of this prosecution for which execution will issue; and that he be rendered infamous, incapable of exercising the elective franchise or of holding public office.

To the verdicts of the jury and the judgments of the Court the defendant excepts and moves that he be allowed to file motion for a new trial, which motion the Court is pleased to allow, and the defendant is allowed thirty (30) days within which to prepare and file his motion for a new trial.

This Court reserves the right to determine whether the sentences are to be consecutive or concurrent and will make that decision upon ruling upon the defendant's motion for a new trial.

ENTER:

/s/ William R. Russell Judge

OPENING STATEMENT

By General Dotson:

[5] * * * Then we have to prove to your satisfaction beyond a reasonable doubt what are called the elements of murder in the first degree. The Court will instruct you what murder is, something to the effect that if any man of sound memory kills another person with malice either expressed or implied it shall be murder. Then the Court I feel certain will instruct you that murder in the first degree is when someone kills someone by means of lying in wait or by any other willful, deliberate, malicious, premeditated killing.

It is our contention that these two homicides were deliberate where the statute says any deliberate killing, and that is that it is willful. And the Court will instruct you I believe that willful means of [6] purpose, that is that the acts that took the life of the deceased were intended for that purpose. Malicious means of evil intent, a heart unconcerned about the welfare of others, being a malignant feeling. Premeditated means that it was preplanned or thought of before it was done. And deliberate refers back to purpose; deliberate is a cool purpose.

* * *

[9] The Court will instruct you what temporary insanity is and I believe it is something to the effect that at the time of the offense a man has a mental illness or defect such that it keeps him from understanding or appreciating the wrongfulness of his act he committed or it kept him from conducting himself in such a way as not to violate the law that he violated. The Court will give you what I think is a clear definition of mental illness but it basically

means that he didn't understand that it was wrong or that he couldn't cause himself to follow the law that was in existence that he is claimed to have violated.

Now, if the Defendant is successful in those two defenses you are to acquit him. But in making a determination as to whether he was or was not temporarily insane you have a right to observe the Defendant today and you had a right to observe the Defendant yesterday—and I'm sure you saw him taking notes. You have a right to listen to all of the witnesses that have testified, not only experts but people who have known him a lot longer than experts. His expert witnesses are going to say that for a period of four or five hours one night he was temporarily insane. But they did not see him the next day or the next week, they waited five to six months before they saw him. That is going to be the Defendant's insanity plea, that some fellow can look at a man based on what he says and other evidence and [10] say, yes, he was temporarily insane.

OPENING STATEMENT

By Mr. Scott Daniel:

[24] We will further show you that even if, as unlikely as it might be, the Prosecutor were able to establish to your satisfaction that Stanley Clark did commit the acts alleged, we will show you by psychiatric experts that Stanley Clark has no recollection of participating in any act as is charged against him and that even if the State should submit evidence to establish that the acts were committed, then the evidence will show that Stanley Clark has total amnesia of any knowledge of the deaths of Joy Faulk or Charles Browning and that due to his mental condition he

could not have possessed the mental capacity required to establish his guilt.

The accused, Stanley Clark, carries with him something more valuable than any amount of money—that is the presumption of innocence. By his plea of not guilty he has denied the charges against him. The law presumes him to be innocent. Presumption is not a mere legal phrase, something to be spoken and forgotten, but it is a clear command of the law. It is fundamental to our principles of democracy and fair play and it exists for the protection of all—for you and for me and for the accused.

As you weigh the facts brought out at this trial, bear in mind that on the side of Stanley Clark is the additional weight of the presumption of his innocence.

TESTIMONY OF DEPUTY SHERIFF DONALD MOOREHEAD

Direct Examination

By General Dotson:

[33] * * * Q. What did you see upon arriving at the scene that night? A. I saw a red Ford pickup truck parked approximately right in here. When I pulled around this side to shine my headlights of my patrol car in the truck I saw the door open. And when I got out I found two bodies lying in the truck.

[34] * * * Q. What was it you observed when you arrived at the scene? A. Red Ford Pickup truck with a driver's door open and two subjects lying in the truck.

Q. Describe the position that the driver of that truck was in. A. The driver was slumped over toward the right-

hand side lying completely on his side just about. The female subject was on the passenger's side. Her head was lying back against the right side of the cab with her head fallen back.

• • •

[47] • • • Q. Describe the seating facilities inside the truck, please, sir. A. There was two bucket seats in the truck.

• • •

[51] • • • Q. After you left the scene where if anywhere did you go? A. We patrolled the immediate area around Threet Road first.

Q. And then where if anyplace did you go? A. I went towards Stanley Clark's house.

Q. In what direction did you travel to get to Stanley Clark's house from where you were at the scene or after you had completed the patrolling of the Threet area? A. I went down Rock Springs Road to 231S and turned right off Rock Spring Road and went to Fosterville.

Q. Where in Fosterville if anyplace did you go? A. I went through Fosterville and turned left and went on down Fosterville Road.

Q. Where did you go then? A. I went by Stanley Clark's house.

Q. How far did you go by Stanley Clark's house? [52] A. About five hundred feet, something like that.

Q. What did you do after going approximately five hundred feet past his house? A. I turned around and headed back towards his house.

Q. For what reason? A. Because I saw some headlights coming from behind me.

Q. And you thought at that time those belonged to whom?

MR. DANIEL: Objection.

THE COURT: Don't lead.

Q. Why did you turn around? A. I just wasn't sure who the headlights belonged to and I wanted to find out.

Q. What happened when you turned around? In what direction were you going then? A. I was going back towards Fosterville on the Fosterville Road.

Q. What if anything did you see then? A. As we got in front of Stanley Clark's house I observed a brown Ford pickup truck as we met him.

Q. What if anything was the pickup truck doing? [53] A. At that time the pickup truck, when we met it, was slowing down.

Q. How close was that to Stanley Clark's house? A. It was exactly—just about exactly in front of his house.

Q. At what rate of speed was the truck going at that time? A. It was slowing—maybe around five miles an hour.

Q. What if anything did you do that that time? A. At that time I put on my emergency equipment, blue lights and siren, and turned around.

Q. What if anything did the truck that you had observed do? A. The truck sped off in the opposite direction from us.

Q. Where did you turn your vehicle around. A. In Stanley Clark's driveway.

Q. What did you do then? A. We proceeded to pursue the truck.

Q. For what distance? A. We pursued it approximately a mile.

Q. Describe the route that you took, please, sir.

[54] A. We went down Fosterville Road towards Bell Buckle Road and went across Bell Buckle Road bearing to the left and back around to the right on Short Creek Road.

Q. At what rate of speed were you going during this time? A. We were traveling approximately fifty or sixty miles an hour.

Q. Did the vehicle you were following stop at the intersection of Bell Buckle Road? A. No, he didn't.

Q. Is there a stop sign at that intersection? A. Yes, there is a stop sign there.

Q. Did he give a turn signal indicating which way he was turning? A. No, sir, he didn't.

Q. After he turned on to Bell Buckle Road in what direction did he go? A. As he turned on Bell Buckle he turned left which would carry you back towards Christiana.

Q. In what direction did he go then? A. He turned right on to Short Creek Road.

Q. Describe that road. A. Short Creek Road bears off to the right approximately sixty yards from Fosterville Road, which is a small gravel road.

[55] Q. How far did you pursue him? A. From there we went approximately three-quarters of a mile.

Q. What if anything did he do then? A. As we got in behind him closer he turned into a driveway at the residence of Jerry Smotherman.

Q. Describe the truck that stopped. A. The truck that stopped was a brown Ford pickup truck.

Q. How would you describe the color again, please, sir? A. A brownish color.

Q. What color? A. Brown.

Q. What other word did you use? A. Brownish.

Q. What person removed himself from that vehicle? A. Stanley Clark got out himself.

[56] * * * Q. When you turn off of 231 going to Christiana, how far is it from that intersection to the intersection going to Fosterville on 231S? A. Do you mean on 231 from Christiana? Q. Yes, sir. A. Approximately four miles.

Q. How far is it from the intersection of 231 and Christiana Road to the town of Christiana? A. I think it is approximately two miles.

Q. Approximately how far is it from the intersection of Fosterville Road and 231 to Fosterville? A. It's about a mile.

* * *

[61] * * * Q. Did the Defendant, Stanley Clark, get out of his truck? A. No, sir, he didn't.

Q. Did you have any conversation with him at that point? [62] A. We told him to get out of the truck.

Q. After telling him to get out of the truck did he? A. No, sir, he didn't.

* * * Q. What did the Defendant do then, after you told him to get out the second time? A. After the second time, he stepped out of the truck.

Q. Without stating what was said, did you [63] have conversation with him then? A. All I did was ask him his name.

Q. How far is it from Fosterville to Stanley Clark's house, please, sir? A. It is approximately three, three and one-half miles.

Q. Approximately how far is it from Stanley Clark's house, where you first pursued him, to where he stopped on Short Creek Road? A. It is approximately a mile.

Q. At what rate of speed were you going during the time that you were following him? A. When we pursued him we were averaging around fifty to sixty miles an hour.

Q. Did you keep him in sight the entire time. A. No.

Q. When did you lose sight of him? A. We lost him back around through this curve, right in here.

Q. How long was it before you picked up sight of him again? A. Anywhere from five to ten seconds.

[64] * * * Q. Mr. Moorehead, prior to your going to the scene had you been on duty that night? A. Yes, sir.

Q. What was your shift of work that day? A. My shift was from 3:00 to 11:30 at that time, I believe.

Q. Had you had occasion to witness or see anything unusual, not at the time you saw it but unusual in light of your later investigation, earlier that night? A. Yes, sir, I did.

Q. What was that, please, sir. [65] A. As I was enroute to go eat—

Q. On what road? A. On Walnut Grove Road—I turned left on Walnut Grove Road off of Midland Road—I met a red Ford pickup truck and a brown Ford pickup truck traveling at a fairly fast rate of speed and the brown one was following the red one and was very close to the red Ford pickup truck.

Q. At what time of day was this? A. It was around 9:00 o'clock or a little after.

Q. Did you later see a truck that you identified or you thought was the same truck? A. Yes, sir, I did.

MR. DANIEL: I object.

THE COURT: Overrule the objection.

Q. Where did you see that truck? A. Do you mean the red one?

Q. Yes, the red one. A. The red one was at the shooting on Threet Road.

Q. Did you later see one similar to the truck that was following it? A. Yes, sir, it was Stanley Clark's truck.

Q. What time was it that you saw the red truck and the brownish truck the first time? [66] A. You mean when I was on Walnut Grove Road the first time?

Q. Yes, Sir. A. It was around 12 minutes after 9:00 when I first saw it.

Q. How close was the brownish or the brown truck to the red truck? A. Not more than five or six feet behind it.

Q. Describe the Walnut Grove Road on which you saw these two trucks? A. The Walnut Grove Road turns left off Midland Road and it is a gravel road that winds around.

Q. What rate of speed were they going? A. Anywhere from forty to fifty miles an hour.

Q. Were you able to identify the passengers in those vehicles? A. No, sir, I was not.

Q. Could you tell how many people were in the first truck or the second truck? A. No, sir.

Q. When was the next time you saw the red truck? A. The next time I saw the red truck was [67] when I arrived at the shooting on Threet Road.

Q. How far is that from the Walnut Grove Road? A. It is approximately five miles.

Q. Is it in the same general vicinity? A. Yes, sir.

Q. What about the next time you saw the brownish truck? A. The next time I saw the brownish truck it was on Fosterville Road.

Q. And that was at what time? A. It was approximately 11:30, I believe.

Q. It was sometime after 11:00, closer to 12:00? A. Yes, sir. I would have to check my notes to make sure on that.

Q. Who did you determine to be the driver of the brown or brownish truck you are talking about once you stopped it on Short Creek Road? A. Stanley Clark.

Redirect Examination

By General Dotson:

[92] * * * Q. Officer Moorehead, would you refer to report No. 3 and in looking at that would you tell us from your report what time you stopped Stanley Clark in Jerry Smotherman's driveway? A. It was 12:40.

Q. And what time is that so the jury will understand it, please, sir. A. That was 20 minutes until 1:00 that night.

Q. So the actual stop was at 12:40 or 20 minutes until 1:00? A. 12:40, yes.

Q. Now, referring to report No. 4 where you were questioned if you had ever mentioned having seen the two trucks before, will you state what the substance of that report is, please, sir?

[93] * * * Q. Read that report in its entirety, please, sir. A. "Officer Moorehead was enroute to go 10-10 subject to call. While headed down Midland Road I turned east on to Walnut Grove Road at about 21:11 hours on the 30th of December. I observed a red pickup truck headed west on Walnut Grove Road with a brown pickup truck following very close behind it. They were traveling about forty miles an hour. Car No. 3 was 10-10 at 21:12. Officer Moorehead was 10-8 in service, 21:42, and proceeded back. At 12:12 car No. 3 was dispatched to a shooting on Threet Road which is about ten miles from where I observed the two pickup trucks.

Q. Now, you stated at about 21:11 on the 30th you observed a pickup truck with a brown pickup truck following it. What is 21:11? A. It is 11 minutes after 9:00.

Q. And you were back in service at what time, please, sir? What is 21:42? A. That is 42 minutes after 9:00.

Q. And then you received a call to go to [94] Threet Road at 12 minutes after 10:00? A. Yes, sir.

Q. How long have you lived on Walnut Grove Road? A. I have lived there for a little over a year.

Q. Again, what distance from where you saw the trucks is it to the place where this homicide took place? A. It is about ten miles from where I saw the pickup trucks.

TESTIMONY OF CRIMINAL INVESTIGATOR RANDY GALLOWAY

Direct Examination

By General Dotson:

[106] * * * Q. What if anything did you observe at Threet Road? A. When I arrived on the scene at Threet Road I observed the ambulance attendant putting the body of Charles Browning into an ambulance. I went on up to the Ford pickup truck that I was directed to by David Grisham and I observed the body of Joy Faulk sitting in the passenger's seat of the Ford pickup truck.

Q. Did you determine what her condition was at that time, please, sir? A. Yes, sir, it appeared to me she had suffered from bullet wounds in the face.

Q. Did you determine at that time whether she was alive or dead? A. She appeared to me to be dead, sir.

[107] * * * Q. On the night in question was there a vehicle parked in front of the red pickup truck? A. Yes, there was.

Q. What type vehicle was it? A. It was a white Chevrolet Monte Carlo.

* * * Q. Do you recall whether the lights were on or off on the pickup truck? A. The lights were on on the pickup truck.

Q. Do you recall whether the inside light was on or off? A. It was off.

[108] * * * Q. Was there any type on-the-scene investigation made by you or anyone else at that time, please, sir? A. Yes, sir, there was.

Q. Relate to the Court and this jury what that was, please, sir. A. I viewed the body of the female that was in the truck. I did a search of the cab of the truck as best I could without disturbing the body.

Q. What if anything did you find inside the cab of the truck? A. I found a spent .25-caliber shell and a small caliber bullet.

Q. Where inside the truck did you find it, please, sir? A. I found the spent shell on the left side of the passenger's seat just between Mrs. Faulk's left hand and left leg.

Q. You found the spent casing where? [109] A. On the left side of the passenger's seat just between Mrs. Faulk's left hand and left leg.

* * *

[112] * * * Q. I will ask you if you along with anyone else made a further investigation of the area, particularly the inside of the truck, at that time? A. Yes, sir, I did.

Q. What if anything was found by you inside that truck? A. I found a small caliber copper-jacketed bullet.

* * *

[116] * * * Q. At any time did you have an occasion to talk to a person by the name of Terry Hill? A. Yes, sir, I talked to Terry Hill on January 3rd.

Q. As a result of talking to Terry Hill where [117] did you go? A. I went out to a portion of Rutherford County called the Buckeye Bottom Road.

Q. What was the purpose of you going to Buckeye Bottom Road? A. To recover some .25 spent cartridges.

Q. Were there any recovered, please sir? A. Yes, there were.

Q. I will hand you this package and ask you if you can identify that, please, sir? A. Yes, sir, this is a packet that the spent .25-caliber shells were placed in.

Q. What does that reflect as being the brand that you recovered? A. That's five Winchester Western .25 automatic shell casings; three Remington Peters .25 automatic shell casings; one norma .25 automatic shell casing.

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[120] • • • Q. Mr. Galloway, prior to your going out on the 3rd to look at these casings, was it brought to your attention that some other casings were found? A. Yes, sir, it was.

Q. And where were they found, please, sir? A. In the pickup truck belonging to the victim Charles Browning.

Q. What was done with the pickup truck after the investigation was made there on the scene? A. It was towed to the City Police Department here in Murfreesboro and put under the shed.

Q. Then when was the truck examined next? A. On the morning of the 31st.

Q. Do you know who made that examination? A. Tom Carmooch of the TBI, Detective David Grisham, myself, and Detective Eddie Peel.

Q. Had Mr. Peel made his investigation prior to you making yours? A. Yes, sir, he had.

[121] Q. What if anything did he turn over to you or did you see in his presence as a result of the investigation? A. Three .25-caliber shells.

[122] • • • Q. After talking with Terry Hill did you form an opinion—without stating what it was—as to what type weapon was used in the homicide? A. Yes, sir, I did.

Q. First you knew it was what type to be sure of? A. A .25 automatic.

Q. Did you determine or have an idea or form an opinion as to what brand it was? A. Yes, sir, I did.

Q. And what was that, please, sir? A. A Targa Excam.

• • •

[127] • • • Q. Describe the weapon that you took to them [Tennessee Bureau of Investigation Crime Laboratory] on the 19th [January 19]. A. It was a Targa Excam .25 automatic.

Q. How did you come to be in possession of that weapon? A. I picked it up at the intersection of Fosterville and Bell Buckle Roads in Christiana.

Q. When did you do that? A. On the 18th of January.

Q. How did you come about being in possession of knowledge or information leading you to go to that area? A. I went there as a result of a call at the Sheriff's Department.

Q. An anonymous or a known caller? A. An anonymous call.

Q. When did the Sheriff's Department receive this call? A. It came to the sheriff's dispatcher at 1:15 p.m. on the 18th.

Q. What did you do that day then? A. I immediately went out to that area.

Q. Did the caller advise you where you could expect to find this gun? A. Yes, sir.

[128] Q. Did you in fact find it where you were told that you would find it? A. Yes, sir, I did.

Q. Where did you say you found this Targa Excam .25 automatic pistol, please, sir? A. At the base of the road sign at the intersection of Fosterville Road and Bell Buckle Road.

• • •

[132] • • • Q. Mr. Galloway, how far is the place where you found this gun from the home of Stanley Clark? A I would estimate three-quarters of a mile, sir.

Q. Would this be the path that you would take going from Stanley Clark's house to Jerry Smotherman's house if you went in the nearest, shortest, most direct route? A. Yes, sir, it is.

• • •

[134] • • • Q. What condition was the pistol in when you found it, please, sir? A. It was rusty. The hammer was back in the cocked position.

• • •

[137] • • • Q. Where was Charlie Browning shot, please, sir? A. He was shot in the left side of the head, approximately in this area.

Q. Where was the victim Joy Faulk shot? A. She was shot in the left cheek about here and through the left eye and through the left shoulder.

[138] * * * Q. Did you form an opinion based on what you saw that night as to the distance the aggressor or the shooter was when Charlie was shot and when Joy was shot? A. Yes, sir, I did.

Q. What range would you say the fellow was? A. I would say from Charlie Browning, six to eight inches probably; Joy Faulk, no farther than eighteen inches.

Q. How could you determine that, please, sir? A. From the size and the area on each victim's face covered by what is called powder burns.

Q. Were powder burns present on both bodies- A. Yes, sir, they were.

Cross Examination

By Mr. Scott Daniel:

[141] * * * Q. All right. Now, I understand that at the scene itself I believe you say there were how many actual bullets, that is spent cartridges or bullets, found? A. Are you talking about the projectile part of the shell, the bullet?

Q. Yes. A. One.

Q. And that was found where? A. It was found on the passenger's side of the truck down in the floorboard just where the door meets the floorboard part.

Q. Now, you found I believe two others and there were a total of four that you found that had been either in the truck or were in the bodies; is that correct? A. To

say positive, sir, I wasn't there when they were taken out of the bodies so I can't say for sure.

Q. All right. How many bullets did you recover that you understood had been fired from the same weapon that caused the deaths? A. I believe there were four.

• • • •

[147] • • • Q. Now, you indicated that the gun you found out on the road was located I believe at this point on Fosterville Road; is that correct? A. Yes, sir, at the corner of Fosterville and Bell Buckle Road.

Q. Is it true or not that from here, Mr. Clark's driveway, there is a bend in the road which would have obscured the vision of this area? A. Yes, sir, I believe there are two bends in the road before you get to that area.

Q. So there is no way to tell from back here, see that sign or see that area of the road from back at Mr. Clark's house? A. No, sir, there is no way to see it if you are standing in the road or standing at his house.

• • • •

[149] • • • Q. You gave an estimate of the distance from Mr. Clark's house to this stop sign or road sign where you found the pistol. Did you have an estimate of distance from there over to Smotherman's? Have you clocked that distance? A. I haven't clocked that distance. You can see Mr. Smotherman's house from that point.

Q. You can see Mr. Smotherman's house from where you found the pistol? A. Yes, sir, at the time I found it you could see his house. With the leaves and the foliage on the trees now you maybe can't see it but at that time you could.

Q. In the wintertime when this happened you could see from this point over to Mr. Smotherman's house? A. Yes, you could see his house.

Q. It's not all that far in other words? A. No, sir.

Q. Now, do you remember or have you had occasion to determine how many shells if any there were in the gun at the time it was found? A. I understand from the lab there was two [150] live rounds left in the gun.

Q. Two live rounds left in it? A. (Witness nods in the affirmative.)

* * * Q. You said you found powder burns on both of the bodies, both Mrs. Faulk and Mr. Browning; is that correct? A. Yes, sir.

[151] Q. And I take it from what you said that there is no way to determine exactly how many inches the gun was fired from but both of them appeared to be fired from almost point-blank range? A. Yes, sir, that is what it appeared to me.

TESTIMONY OF DETECTIVE CHUCK VAUGHN

Direct Examination

By General Dotson:

[155] * * * Q. When did you make a search of the driver if at all, please sir. A. After I had talked to Mr. and Mrs. Pittman inside the trailer we began processing the scene. At that time I raised the driver up and found a pistol in his right pocket.

Q. Do you recall what kind of pistol that was? A. It was a .22-caliber RG pistol.

Q. I will hand you this pistol and ask you if you can identify it, please, sir? A. Yes, sir.

Q. Where have you seen that pistol before? A. This is the pistol I pulled out of Charles Browning's pocket.

Q. Describe for the Court and the jury how that pistol was in his pocket, please, sir. A. He was slumped over. As I raised him up—he had on a pair of levis that were sort of tight, fit tightly—the pistol was inside his pocket with the handle sticking out like that.

Q. Do you have it placed in your pocket so that just approximately one-half of the butt is showing? A. Yes, and the pocket was tight against the gun.

[156] Q. How did you remove that pistol? A. I had to lean Mr. Browning over toward the left side of the truck so that I could pull the gun out of his pocket. It would not come out until I straightened him up a little bit.

Q. What if anything did you do with the pistol then? A. I gave it to Detective Grisham.

Q. At that time did you check it to see if it had been fired at all? A. No, sir.

Cross Examination

By Mr. Scott Daniel:

[157] * * * Q. Was the door to the passenger's side of the vehicle shut? A. Yes, sir.

Q. And were the windows all up? [158] A. The passenger window was up; I believe the driver's window was down and the door was open.

Q. The driver's window was down? A. Yes, sir, the passenger window was up and the driver's window was down.

TESTIMONY OF DETECTIVE EDDIE PEEL

Direct Examination

By General Dotson:

[159] * * * Q. The following day did you take part in any way with the investigation of the shootings? A. Yes, sir.

Q. What if anything did that consist of, please, sir? A. The victim's truck was towed to the Police Department here in the City. It was parked under the shed in back of the Police Department. It was to be processed later that day. That morning I went to the Police Department where the truck was at and inside the truck I saw some empty cartridges.

Q. How many empty cartridges did you find inside the truck? A. Three.

Q. Where inside the truck did you find these empty cartridges? A. I found one in the driver's seat, one in the passenger's seat, and one on the floorboard behind the passenger's seat. The truck had bucket seats in it.

Q. Finding all three of these cartridges inside the truck indicated that the gun was where when it was [160] fired. A. It was inside the cab of the truck.

* * * Q. Did you determine what gauge these were when you found them? A. .25-caliber.

TESTIMONY OF DETECTIVE DAVID GRISHAM

Direct Examination

By General Dotson:

[166] * * * Q. Did you have an opportunity to view Joy Faulk's body and Charlie Browning's body? [167] A. Yes, sir.

Q. What if anything did you observe about them at the hospital? A. Joy Faulk, I observed what appeared to be three bullet wounds.

Q. Where were they, please, sir? A. One was in her left cheek, one bullet wound was in her left eye, and the third bullet wound was on the back of her left shoulder.

Q. After you left the hospital were you and Mr. Galloway together most of the time during the investigation? A. Yes, sir.

Q. When was an autopsy performed on the two bodies? A. January 1st.

Q. Was Mr. Galloway with you on that day? A. No, sir.

Q. Who performed that autopsy, please, sir? A. Dr. Bob Kendall.

Q. Were you present when he performed the autopsy? A. Yes, sir.

Q. What foreign, if any, substances did he remove from the bodies of Joy Faulk and Charlie Browning? [168] A. He removed two bullets from Joy Faulk and one bullet from Charles Browning.

[169] * * * Q. Were you present when the autopsy was performed on Charles Browning? A. Yes, sir.

Q. I will hand you this container and ask if you can identify this, please, sir? A. This is a container marked by me with a bullet in it.

Q. Where did you get that? A. This is a bullet taken out of [170] Charles Browning.

[171] * * * Q. Do you recall whether the lights were on or off on the truck you saw out at Jeff Faulk's trailer? A. The headlights? Q. Yes. A. The headlights were on.

Q. Do you recall, if there was another vehicle in front of that truck? A. Yes, sir.

Q. What kind of vehicle was that? A. It was a white Monte Carlo.

Q. Do you recall if the inside light was on on the truck or not? A. No, sir.

Q. It was not on? A. It was not on.

[172] * * * Q. Did Chuck Vaughn turn over a pistol to you? A. Yes, sir.

Q. I will hand you this pistol that has already been introduced into evidence and ask you if you can identify that, please, sir? A. Yes, sir.

Q. What is that? A. It is a RG .22 pistol.

Q. What caliber? A. .22.

Q. Did you make a visual inspection of that gun upon Mr. Vaughn turning it over to you? A. Yes, sir.

Q. And what did that inspection reveal as to whether it was or was not loaded? A. It was loaded, fully loaded with one spent cartridge.

Q. What? A. It was fully loaded but had one spent cartridge.

Q. At the time you looked at it did you determine where the spent cartridge was inside the chamber? A. Yes, sir.

Q. Where was it? [173] A. About half way down on the right side. It wasn't lined with the chamber.

Q. It was not in the position where it would have been had it just been fired? A. No, sir.

Q. Did you have that gun taken to the lab to make a determination as to whether it had been fired that night or not? A. No, sir.

Q. Did you make an inspection by smell to see if it had been fired? A. No, sir.

Q. Mr. Galloway I believe found one spent casing at the scene? A. Yes, sir.

Q. And he found one bullet, the contents of a casing, at the scene? A. Yes, sir.

Q. Mr. Peel found three spent casings in the truck the next day? A. Yes, sir.

Q. What if anything did Charles Smith find at the scene the next day and who is Charles Smith? A. Charles Smith is a deputy with the Sheriff's office. He was assigned that day to protect the [174] scene. While he was there he found a .25 automatic shell casing.

Q. What if anything did he do with that? A. He gave it to me.

Q. What if anything did you do with it? A. I took it to my office.

Q. Did you take it to the laboratory? A. No, sir.

Q. Do you know where it is today? A. No, sir.

Q. Did you intentionally not take that shell to the lab? A. No, sir.

Q. How many times have you looked for it? A. Quite a few.

Q. What you're saying is that it is just lost? A. I just lost it.

[175] * * * Q. Where were the bullets in the deceaseds' bodies when Dr. Kendall removed them? A. Joy Faulk had one just behind her neck right underneath her skin and the other was in the back of her shoulder almost between her shoulder blades.

Q. Where was the bullet removed from Charlie Browning? A. In his brain.

Q. Where was he shot? A. Right on the cheekbone.

Cross Examination

By Mr. Scott Daniel:

[184] * * * Q. Now, I believe you indicated from your [185] investigation that you found powder burns on both bodies; is that correct? A. What appeared to be powder burns.

Q. It looked as though both victims had been shot at virtually point-blank range; is that a fair statement? A. Yes.

TESTIMONY OF MITZI FAULK

Direct Examination

By General Dotson:

[201] * * * Q. What was your mother's name, hon? A. Joy.

Q. Is Joy living today? A. No.

Q. What happened to Joy? A. She's dead.

Q. What happened to her? A. Clicker shot her.

Q. Who is Clicker? A. Clicker Clark.

Q. How many times did he shoot her? A. Three.

Q. Where did he shoot her, hon? A. There was two up here and one in her jaw.

Q. Who is Charlie—do you know Charlie Sue? A. (Witness nods in the affirmative.)

Q. Who was Charlie Sue? A. [202] A. Shirley's mama—I mean Shirley's husband.

Q. What happened to Charlie Sue? A. He's dead.

Q. What caused him to die? A. Clicker shot him.

Q. Where was your mother and Clicker? Where was your mother and Charlie Sue when Clicker shot them? A. Over at Jeff's.

Q. At Jeff's trailer? A. Yes.

Q. Were you inside the truck? A. Yes.

Q. Who was in the truck with you, hon? A. My mama.

Q. And who else? A. Charlie Sue.

Q. And who else? A. Michelle.

Q. All right, what happened after Clicker shot your mother and Charlie Sue? A. We got out.

Q. How did you get out of the truck, hon? A. I climbed over Charlie Sue.

Q. And what did Shellybean [Michelle] do? A. She climbed over Mama.

[203] Q. And did she climb over Charlie Sue too? A. Yes.

[204] * * * Q. What kind of truck was Clicker in? A. Orange and red.

Q. What color? A. Orangeish red.

Q. Where was his truck? A. Right behind ours.

Q. What was he doing behind your truck? A. I don't know.

Q. Was he following you? A. Uh-huh.

Q. Why did you pull into Jeff's house? [205] A. So he could pass us.

Q. What did he do when you pulled in to Jeff's house? A. He shot my mama and Charlie Sue.

Q. Did he pull his truck in behind Charlie Sue's truck? A. Yes.

Q. Did Charlie Sue have a gun? A. Uh-huh.

Q. Where was his gun? A. In his pocket.

Q. Did he get his gun out? A. He didn't have time.

Q. Do you know why he didn't have time, hon? A. Huh-huh.

[206] * * * Q. Do you see Clicker in here today? A. Yes.

Q. Where is Clicker? A. Right there (indicating).

Q. Is he the one that shot your mother? A. Yes.

Q. How many times did he shoot her? A. Three times.

Q. How many times did he shoot Charlie Sue? A. One.

Q. Did you and your mother used to live with Clicker? A. Uh-huh.

Q. How long did your mother live with Clicker? A. I don't know.

* * *

[210] * * * Q. Did your mother and Charlie Sue say anything after he shot them? A. Huh-huh.

Q. Did you say anything to Clicker? A. Huh-huh.

Q. Did your little sister say anything to him? A. (Witness shakes head in the negative).

CROSS EXAMINATION

By Mr. Scott Daniel:

[223] * * * Q. Now, when the person came up there [224] and shot your mama and Charlie Sue, did they say anything at all? A. Huh-huh.

Q. Didn't say anything at all? A. (Witness shakes in the negative).

Q. And your mama and Charlie Sue didn't say anything at all? A. Not that I know of.

Q. Did anybody say anything about it before they got there, before the person got there? A. Huh-huh.

Q. Didn't say anything at all? A. (Witness shakes head in the negative.)

Q. I don't believe you knew—you didn't know there was a truck behind you, did you? A. (Witness nods in the affirmative.)

Q. You did? A. Uh-huh.

Q. But nobody said anything about it? A. Huh-huh.

Q. Didn't say anything at all? A. Huh-huh.

Q. How long was the truck behind you or do you know? A. About an hour, I guess.

[225] Q. About an hour? A real long time? A. I don't know.

Q. Did you all ever stop to see who was in the truck? A. Huh-huh.

Q. Nobody ever said anything at all about who was in the truck? A. (Witness shakes head in the negative.)

Q. And when the truck stopped did it stop right behind you? A. Uh-huh.

Q. And I don't believe you could see the truck then, could you? A. Uh-huh.

Q. How could you see it? A. He left his lights on.

Q. So all you could see was lights? Is that what you're saying? A. (Witness nods in the affirmative.)

[226] * * * Q. Now, when you got to Jeff's house was there any fight or anything at all happened before this man came up in the truck? A. Huh-huh.

Q. Now, when you got there was there any kind of a fight before you got there? A. Huh-huh.

Q. There wasn't any fight at all? A. (Witness shakes head in the negative.)

Q. You didn't ever say to anybody that—let me ask you this: How did you know Charlie Sue had a gun? A. It was in his pocket.

* * *

[232] * * * Q. Did you tell anybody, did you say after this happened, "they have guns; they have been fighting"? A. (Witness shakes head in the negative.)

Q. You didn't say that at all A. (No response by the witness.)

Q. You don't remember ever saying "they have been fighting"? A. They hadn't.

Q. They hadn't? That has never been said? A. (Witness shrugs shoulders.)

Redirect Examination

By General Dotson:

[252] Q. Mitzi, did you see the person that shot your mother? A. (Witness nods in the affirmative.)

Q. Who shot your mother? A. Clicker.

Q. Did you see the person that shot Charlie Sue? A. (Witness nods in the affirmative.)

Q. Who shot Charlie Sue? A. Clicker.

Q. Your daddy didn't shoot Charlie Sue, did he? A. Huh-huh.

Q. Your daddy didn't shoot your mother either, did he? A. Huh-huh.

[253] • • • Q. Did Clicker Clark shoot your mother? A. Uh-huh.

Q. How many times? A. Three.

Q. How many times did he shoot Charlie Sue? A. One.

Q. You won't ever forget it, will you? A. Huh-huh.

Bench Conference

[256] * * * MR. DANIEL: If your Honor please, I would presume by the opening of this testimony that the Attorney General is attempting to show statements made by the witness outside the courtroom to somebody else and I think these are simply hearsay statements and until her testimony is contradicted or impeached by some other witness I don't see that this would be proper or admissible.

THE COURT: Are you talking about the statements of the little girl?

MR. DANIEL: Statements she made to somebody else. I don't think they can prove for any purpose.

THE COURT: Mr. Daniel, I was aware of this possible problem as the proof developed and I would say that you so successfully contradicted her stories with your cross-examination that her credibility has been impeached, and you also developed a theory that her father had concocted her story for the purposes of testimony and so I think any spontaneous utterances in close proximity to this occurrence would be admissible.

TESTIMONY OF MARY SMITH

Direct Examination

By General Dotson:

[259] * * * Q. Did Mitzi tell you what she was doing on the road? A. She said, "They are fighting. They have got guns." And she said, "My mama has been shot."

Q. Did she tell you who shot her mother? A. She said, "Charles and Clicker have got guns."

Q. Then did she tell you what had happened to her mother? A. She said, "My mother is dead. Said she has blood all over her face."

Q. Did she tell you who shot her mother? A. Yes.

Q. Ma'am? A. Yes.

Q. Who did she tell you shot her mother? A. She said, "Clicker shot my mother."

[269] * * * Q. Do you remember telling me and answering questions previously that she didn't say who shot her mother and she didn't say she saw the man who shot her mother? A. Yes.

[270] * * * Q. And that is what you said? And I believe when it came down to asking you you said, "They have been fighting. They have guns." Is that correct? A. Yes.

* * *

[272] * * * Q. Do you remember Mr. Dotson asking you then at that time, this is the question. Do you remember Mr. Dotson asking you this question: "She told you she saw her mother? Did she tell you who shot her mother?" And your answer, "No."

And the question, "Did she tell you she saw the man who shot her mother?" And your answer, "Not—no."

Question, "What did you start to say?" And your answer, "Not directly."

Question, "Did she tell you indirectly?" "Not indirectly that anybody specifically had shot her mother. The names were mentioned, Charles, Clicker. It says Charles, Charlie Sue, and I believe she called him—they

have gun. She said Charles and Clicker, they have gun and they have been fighting. I don't know what sequence this would have followed or I don't know what connections there was. I'm telling you what she told me."

Now, do you you recall giving that testimony to the same Mr. Dotson? A. Yes, I do.

Redirect Examination

By General Dotson:

[274] * * * Q. Reading from Page 13 of the same manuscript Mr. Daniel was reading from, Line 22,

"Q What did you start to say?

"A Not directly.

"Q Did she tell you indirectly?

"A Not indirectly that anybody had specifically shot her mother. The names were mentioned.

"Q What names were mentioned?

Cross Examination

By Mr. Scott Daniel:

"A Charles and Clicker.

"Q And Charlie Sue I believe is what she called him, isn't it?

"A She said Charles and Clicker. They have guns and they are fighting. They have been fighting. I don't know what sequence this would have followed or I don't know what connection there was. I'm telling you what she told me.

"Q Is it not true that you and your husband were more upset than the two little children were?

"A It's quite possible.

"Q So you're not sure what she told you are you?

"A I'm sure what I repeated in court here today, yes.

"Q That she said Clicker. Did she say Clicker was where her mother was shot at the scene? Not using those words, but when did she say Clicker and this fellow were fighting?

"A She didn't say any specific time.

"Q When did you take it to mean?

"A Well, I can't truthfully say.

"Q Do you know who she was talking about when she said Clicker?

"A No, because I don't know either side. I don't know any of them. I know none of them. I had never seen the children until we picked them up that night.

"Q She told you that they both had guns and they were fighting?

"A She said they have guns and they have been fighting. He has killed my mother and her mother was shot in the eye.

"Q Who did she say when said he has killed my mother?

"A I didn't ask any questions. As I stated earlier, I didn't ask any questions.

TESTIMONY OF MARION SMITH

Direct Examination

By General Dotson:

[305] * * * Q. What if anything was said by either one of them when they first got in the vehicle? A. What I could understand, they were asking for help. The oldest one was doing the talking. She was asking for help.

Q. What was her emotional condition? A. She was pretty emotional.

Q. Would you classify that as being upset? A. Yes, I would.

Q. What did your emotional condition get at that time? A. After she told me what happened I was upset.

Q. What did she tell you had happened? A. She said they were fighting, they had guns. Her mother had been shot or been killed. And I asked her who she was.

Cross Examination

By Mr. Scott Daniel:

[315] * * * Q. I believe you also said the children, describing what had happened, simply said that their mother had been killed, they are fighting, and they had guns? A. That's right.

Q. And I believe you also said that she did not say who killed her mother and you don't recall the children mentioning any names at all? [316] A. Right, I do not recall that.

TESTIMONY OF BILL HUCKABY

Direct Examination

By General Dotson:

[348] * * * Q. Did you and your wife go in the direction to get the children? A. Yeah.

Q. Did you stop anywhere before getting the children? A. Yeah, we stopped at Sam's to see if he was home to go with us to get the kids.

Q. Was Sam at home? A. No, he was gone to Shelbyville.

Q. Where then did you go? A. We went from there to Jeff Faulk's.

Q. For what reason did you go to Jeff Faulk's? A. We were going to get him to go with us because he was more familiar with the kids than we were.

Q. What if anything did you observe? A. This truck was sitting there and the lights was on and the motor was running and the radio was playing. [349] My wife got out and went by the truck and went on up and knocked on the door. When she went by the truck she made a remark, "There's somebody tapped out." With all those cars around there we thought they were having a party but there wasn't anybody at home in Jeff's trailer.

* * * Q. So you went up to that trailer and your wife went by and stated something about somebdy being in the truck tapped out? A. Uh-huh.

Q. Did she go to the trailer? A. Yeah, she went on up and knocked on the door.

Q. Was there anyone there? [350] A. No.

Q. Do you recall whether the door was open or closed? A. It was closed.

Q. Were the lights on or off in the trailer? A. The lights were on.

Q. What did you do then? A. Well, I thought maybe if it was somebody tapped out the best thing for me to do was to get up there in case he got up, you know, and walked into her when he came back by, to keep down a rukus I just walked over there and hollered and nobody didn't answer.

Q. What did you say you observed about the truck? What kind of truck was it, if you recall? A. It was red Ford pickup.

Q. The lights were on? A. Yeah.

Q. What else was on? A. The radio was playing and the motor was running.

Q. So what did you do then? A. I just walked up there and hollered at them, you know, and nobody didn't say nothing. And I couldn't see in there real good but I could tell there was two in it and he was laying down like he was working on the radio. And [351] I reached in and turned the light on and when I did, it was awful. I mean, blood and foam out of her mouth and necklace was swelled real tight here. And I just motioned for her to come on, let's go, that that was them. See, I wasn't expecting to find them.

Q. What did you do them? A. She came by and she had to look and she started crying and squalling and we got in the car and went on up to Hackneys.

Q. What about the truck motor? A. I cut the motor off and turned that light on to see but I don't remember—

Q. What light are you talking about? A. The dome light on the cab, the headlight, I just turned it to the left.

Q. And after you saw what did you do? A. I think I cut the motor off and we left and went on up to Hackneys.

Q. Did you leave the headlights on? A. I don't remember for sure whether I cut them off or left them on.

TESTIMONY OF LOYALL PITTMAN

Direct Examination

By General Dotson:

[390] Q. Did your daughter Joy and Sam Faulk get a divorce? A. Yes, they did.

Q. After they got a divorce did at any time your daughter start seeing the Defendant, Clicker Clark? A. Yes.

Q. Do you recall when she first started seeing him? A. Well, it was somewhere toward the last part of '78 she started seeing him, as well as my recollection, shortly after her divorce.

Q. When did she get a divorce? A. In November of '78.

Q. Are you sure it's '78 or '77? A. Well, may have been '77—yes, it was '77.

Q. And after she got a divorce—when you say she dated Clicker, did their relationship get more serious than that? A. Well, yes, she moved in with him.

Q. Do you recall when that happened? A. I don't know exactly the date but it was somewhere along either before the first of the year or after the first of the year, '77-'78.

Q. What do you mean she moved in with him? [391] A. She moved in where he lives now.

Q. Did she move her children with her? A. Yes.

Q. Did you have occasion to see her or see Mr. Clark during this period of time? A. Yes, I saw them.

Q. With just a yes or no answer, during this period of time did your daughter and Clicker Clark have any trouble with one another, disturbances? A. Yes.

Q. During this period of time did you ever have occasion to know of any threats by your daughter toward him or him toward your daughter. A. Him toward my daughter.

Q. Can you tell the Court and the jury when the first one of those was and what was the occasion behind it, please, sir? A. It was after school started last fall, 1978. She was leaving her oldest daughter in Nashville with her mother and she was sending her to school and they had taken her down there and was on the way back and they pulled in my driveway and they had been arguing and she came into my house and asked me if I wouldn't take him home.

Q. Had she been living with him during this period of time? [392] A. She had been living with him. She had moved out on some occasions but moved back.

Q. She had moved out on occasion prior to this time? A. Yes, sir.

Q. On this day did you in fact talk to the Defendant, Clicker Clark? A. I took him in my truck and drove him home.

Q. Could you tell whether he had or had not been drinking? A. He had been drinking.

Q. How could you tell that? A. I could smell it.

Q. What was the conversation you had with Mr. Clark on the way as you were taking him home that day? A. I

don't recall all of the words and everything that was spoken, but on several different times he made the threat that if he caught her with anybody, you know anybody else, that he was going to kill her.

Q. He told you that on the way home that day? A. Yes, sir.

Q. Did you have any more words or was anything said with him at that time about that? A. I just told him he would be best off and [393] so would Joy for him to stay away from her and her away from him.

Q. After that did Joy and Clicker go back together? A. Yes, for some period of time. I don't know really if she stayed and lived over there or not but they had saw each other quite often.

Q. You're not saying she didn't, you just don't remember? A. I don't know that she went and moved back in after that.

Q. After that threat did you have an occasion to talk with Mr. Clark again? A. On another occasion. It happened—she came in and he was with her, coming from work, and he was in the car with her.

• • •

[395] A. She came in the drive—that was when she was staying at my house—and wanted me to take him home.

Q. Did you get out and talk to him again? A. We got in the truck.

Q. What kind of truck was it? A. It was my '62 model pickup Chevrolet.

Q. What kind of vehicle was he in? He was with her in her car.

Q. How did he come about being in her car? A. I don't know where he had gotten in the car at but somewhere either at work or on the way home he had gotten in the car with her.

Q. Was he drinking on this occasion? A. Yes, sir.

Q. What if anything was the conversation you had with him then? A. It was just nearly—about like the first one.

Q. And what was that? A. He made threats if—he wanted her and he didn't want her to be with anybody else and if he caught her with anyone that he would kill her.

Q. During this period of time to your knowledge was she going with anyone else? A. Not to my knowledge, no, sir.

[396] Q. After that did they have a reconciliation or getting back together of any sort? Did they see one another any after that time? A. Well, they saw each other but I really don't know under what circumstances.

Q. Did you ever have an occasion to have a confrontation or discussion with him again? A. One night after she had driven in the driveway from work he came in the driveway in his truck.

Q. You said the first two incidents took place after school started? A. Well, this was between the period of time that school started and up until—all three occasions.

Q. When was this last occasion? A. Sometime prior to Thanksgiving.

Q. How close to Thanksgiving was it? A. I don't really know exactly how close because we were gone the week of Thanksgiving.

Q. Was it right before you left? A. It was a short while before we left, I'd say a week or two weeks. I could be off one way or the other.

Q. When is Thanksgiving? A. It's in November.

Q. The third Thursday or something like that? [397] A. Yes, sir.

Q. So this was sometime in November of '78? A. Yes, sir.

Q. What was the confrontation you had with Clicker Clark on that occasion? A. Well, he got out of his truck and came to the end of my porch. And he wanted to see my daughter and I told him that he couldn't see her and him drinking.

Q. How could you tell he was drinking? A. I could smell it and then with his actions and loud speech.

Q. What else did he say to you? A. He shook his finger at me like that (indicating) and said, "I'm telling you, her daddy, if I catch her with anybody else I'm going to kill her."

Q. What if anything did you say to him? A. I told him to leave—or I asked him to leave—and for him to stay

away from her. And then he didn't make any attempt to leave and I told him he had better leave.

Q. What was the conversation further that you had with him? A. Not much. He turned and left.

• • •

[401] • • • Q. On December 30th, 1978, sometime around 8:30 or 9:00 o'clock, did you have occasion to see your daughter? A. Yes, sir, I did.

Q. What time of the day was it that you saw your daughter? A. The last time I saw her was between 8:00 and 8:30.

Q. Where did you see her? A. At my house.

Q. What was the occasion of her being at your house? A. She had came into my driveway in a truck with Mr. Browning and the two little girls, Mitzi and Michelle.

[402] • • • Q. How far do you live from where Jeff Faulk lived? [403] A. I really haven't measured the mileage. I would say it's about five miles out to 231—it would be somewhere around I guess ten or twelve miles. That is a rough guess; I don't know for sure.

Q. You don't know how long it would take to drive from your house—did you go down Walnut Grove Road? A. Well, you could go Walnut Grove Road or you could go Rock Springs Road or you could go to Midland Road and down.

Q. There are several roads out there—A. Yes, sir.

Q. —that don't go anywhere but they all go the same place? A. Well, you can end up at the same place with the right turns.

Q. So you don't know how long it would have taken them to drive from your house or to Jeff's house? A. Well, if they would have went directly from my house over there it wouldn't have taken long.

• • •

[411] • • • Q. Even after Thanksgiving, did you have further conversation with Stanley Clark? A. Well, he had—

Q. Did you have further conversation with Stanley Clark? A. Yes or no?

Q. Yes or no. A. Yes.

Q. Do you recall what day it was? A. No, sir, I don't know exactly what day it was.

Q. Did you have a conversation with him on Christmas day? A. Yes, sir, Christmas evening.

Q. Do you recall that conversation? A. Yes, sir, somewhat.

Q. What was Clicker's request of you at that time as far as it related to Joy? A. He wanted to come over to my house and be with her on Christmas evening.

Q. And what did you tell him at that time? A. I told him it would be best if he didn't [412] come over there.

Q. Then did you have anymore conversation with him during that time frame? A. Somewhat of an argument.

Q. What was this argument about? A. Well, he made some kind of statement about something that was going on, about her staying with some other man, and I told him I didn't know anything about it and he told me I was a liar.

Q. What did he say about her staying with other people? A. Well, there wasn't a whole lot said on the phone because I told him I wasn't listening to a bunch of stuff and if he wanted to call me a liar to come over to my house and call that to me to my face.

Q. Was he upset at that time? A. He seemed to be very much so.

Q. Could you tell whether he had been drinking at that time? A. No, sir, I couldn't say that he was.

Q. When was this conversation had with Clicker on Christmas? Was it Christmas evening? A. It was Christmas evening just a short while after dark as well as I recall.

Q. It wasn't the day before Christmas? [413] A. It was Christmas day, Christmas evening.

Cross-Examination

By Mr. Scott Daniel

[423] * * * Q. Although you say he threatened the life of your daughter you didn't ask her anything about it? A. I did not.

Q. You didn't even tell her about these threats? A. I told her about them but I didn't inquire as to what had prompted it other than I said that—to him and her—if you can't get along stay away from one another.

[424] Q. As I understand it there were three separate occasions. Each time did you tell your daughter that Stanley had threatened her? A. I don't remember whether I told her each time or not.

Q. Would you have had any reason not to have told her or what would have been your attitude towards that? A. I didn't have any reason not to tell her.

Q. Did you have reason to tell her? Do you know whether you did? A. I don't remember whether I discussed it with her on all three occasions or not. On the third time she heard the conversation that went on herself.

Q. That was the one where— A. —he came to the edge of the porch.

Q. But what I'm asking you about is this: In your conversations on any of these three occasions you didn't go into any indepth [sic] or you didn't ask your daughter about it or you didn't— A. I did not, no sir.

TESTIMONY OF ELLEN PITTMAN

Direct Examination

By General Dotson:

[461] * * * Q. On or about a day, two days before Thanksgiving, did you have occasion to overhear a conversation between your husband, Loyall Pittman, and the defendant, Clicker Clark? A. Yes, I did.

Q. Where was that conversation had between your husband and Clicker Clark? A. On our front porch.

[462] * * * Q. Did you hear your husband and Clicker discuss your step-daughter, Joy Faulk? A. Yes.

Q. All right, what was the conversation that they had at that time, please, ma'am? A. I heard Mr. Clark tell my husband, "I'll tell you one thing, if I catch her with anyone I'll kill her."

TESTIMONY OF SHIRLEY BROWNING

Direct Examination

By General Dotson:

[470] * * * Q. What night did you have a conversation with Clicker at that place? A. It was the 24th, the day before Christmas. He come up there and—

Q. Was it on a Saturday or Sunday? A. Saturday.

Q. Was it Saturday afternoon or Saturday night? A. Saturday night.

Q. What was the conversation that you had with Clicker? A. He come up there behind me and I looked up and he was standing behind me and I asked him what was he doing there and he said he wanted to find out what was going on between Charles and Joy.

Q. Between who? A. Charles and Joy. And I told him I didn't know nothing about it except for all I knew Charles had taken [471] her to pick up the kids from my mother's house on that Friday night and they stayed at Johnny's that night.

Q. Is that the Friday night before this Saturday night? A. Uh-huh.

Q. And you told him you thought they had spent the night together? A. I told him that they had spent the night over there, at Johnny's.

Q. What else if anything did he say to you about Joy and your husband? A. He asked us—there was a girl that was with me—

Q. Who was the girl that was with you? A. Ethel Patterson.

Q. He said, "What would you do with somebody that gave you the claps? And he said "I ought to kill her." And me and Ethel just laughed it off. He just sat there and that was all he talked about the rest of the night.

Q. What was all he talked about the rest of the night? A. About her and Charles. He kept asking me what was going on and I kept telling him I didn't know. I said, "Her car tore up and Charles took her to get the kids." [472] And he said that Joy told him that the car tore up.

Q. Then when was the next time you saw Stanley Clark? A. The same night at 1:30 he came to my house.

Q. What if anything did he say to you at your house that night? A. Well, he came and he knocked on the door and I pulled up the curtain over the door and he asked me to let him in and I told him no. I told him I didn't want to talk to him. And he said, "I just want to know what's going on between Charles and Joy." And I said, "Clicker, I told you at Green Acres that I didn't know nothing about it and I don't want to talk to you, just get out of here."

Q. That was on a Saturday night? A. That was Saturday night.

Q. Then when was the next time you saw him after that? A. On Monday night, the 26th, at about 10:30.

Q. Was Monday night the 25th or the 26th, or do you remember? A. It was the day after Christmas, the 26th.

Q. Where did you see him? A. At my house.

Q. Was anyone with him when he came to your house? [473] A. Sylvia Kay Hillis.

Q. Who is she? A. She lives up the road about six miles from me.

Q. Was she raised in that neighborhood out there? A. Uh-huh.

Q. You have known her for sometime too? A. Uh-huh.

Q. What if anything was said to you by Clicker Clark on that night? A. Well, me and my next door neighbor, Ethel Watson—she had come over to get some aspirins. I had done been in bed an hour and she come over to get some aspirins at 10:30 and she said, "Well, here comes Charlie Sue in," because it was a truck, a Ford like his. And when I opened the door I said, "No, that's not Charles, that's Clicker and Sylvia Kay." And she stood behind me and he said, "Shirley, let me in; I want to talk to you." And he grabbed for the door. And I said, "No, I don't want to talk to you. I said I've not got nothing to say to you. And he said, "I just want to know what's going on between Charles and Joy." And I said, "Clicker, I done told you I don't want to talk to you. Ya'll can just [474] leave." And Sylvia Kay said, "He just wants to know what's going on, Shirley." And I said, "I don't care, I've not got nothing to say to neither one of you. I said Charles and I are friends and we will always be friends and I said ya'll won't never break us up.

Q. What else if anything did he say to you about it? A. He said, "Well, I just wanted to find out what is going on before I got mad and blew off the handle and did what I had to do."

Q. How many times did he say that? A. Twice I think.

TESTIMONY OF SYLVIA KAY [HILLIS] BARRETT

Direct Examination

By General Dotson:

[504] * * * Q. On or about December of 1978 around Christmas or the day after or sometime through there, did you have occasion to be in the company of Stanley Clark? A. Yes, sir, I did.

Q. What was that occasion, please, ma'am? A. That was Christmas night. I rode home from work.

* * *

[506] * * * Q. Was anything discussed about Charlie Browning or Joy Faulk? A. Well, just—the only thing, Stanley said that—

Q. Prior to that time was anything said about your ex-husband—what was his name? A. Jessie Leathers.

Q. Was anything said about Jessie coming there? A. I said, "Let's hurry up and get out of here. I said "Jessie is liable to drive up."

Q. And what if anything did Stanley say? A. He said, "Well, don't worry about that; [507] I can take care of that."

Q. What if anything did he show you then? A. Well, he pulled something out of his pocket but I couldn't swear to what exactly, you know, it was which one it was. It looked like a .25 automatic to me.

Q. What color was it? A. It was dark.

Q. Did it look like a .25 automatic? A. Yes, sir, it did.

Q. Did it look anything like that gun? A. Yes, sir, it was dark.

Q. It was dark? A. Uh-huh.

Q. Before that date you knew what a .25 automatic looked like, didn't you? A. Yes, sir, I have owned one.

Q. You have owned one. A. Yes, sir.

Q. So this was on a Monday he had a .25 automatic pistol with him? A. Yes, sir.

Q. Where did you and Clicker go after he showed you the pistol? A. Well, we went on 231 and headed toward home.

[508] Q. Where did you stop? A. At Shirley Browning's house.

Q. Do you know why he stopped? A. Well, he said he wanted to talk to her.

Q. All right, had you and Clicker had any conversation about Charlie Browning or Joy Faulk before then? A. The only thing, just Stanley seemed upset about her.

Q. What did he say about her? A. Well, he just said if he ever caught her with anybody he was afraid he would do the wrong thing.

Q. What were the words he used, though? A. He said, "Well, if I ever catch her with anybody I'll kill her."

Q. He told you that on the 25th? A. Yes, sir.

[509] * * * Q. What was the conversation between Shirley and Clicker? A. She was telling Clicker about Charlie Sue and Joy going together.

Q. Okay, why did Clicker want to stop there, though? A. I don't know.

Q. He didn't say anything about it? A. No, sir. He said he just wanted to talk to her.

Q. Did he make any threats or say anything to Shirley there that you remember about Joy and Charlie Sue? A. No, sir.

Q. Did he say anything about I might get mad and fly off the handle? A. No, sir.

Q. Did you hear him say that? A. No, sir.

Q. Could he have said that? A. If he had said it I would have remembered it but I don't remember him saying anything like that.

Q. Well, during part of the time you were there did you not go get in the truck before Clicker did? A. No, sir. [510] Q. You stood there the whole time? A. That's right.

Q. You don't recall any of that conversation? A. No, sir.

Q. What did you do after you got back in the truck? First, how long did you stay there? A. I would say about five minutes.

Q. Then where did you go? A. We left from there and started on home. We got to Christiana Lane and he turned off there and I said, "Where are we going, Stanley?" And he said, "Well, I wanted to go by my house and check on things."

Q. Did you in fact go to Stanley's house? A. Yes, sir.

Q. Did you get out of the truck? A. I got out and went as far as up in the yard because the front door was standing open when we drove up.

Q. And what did he say after he went inside the house? A. Well, I didn't go inside the house. I just went up in the yard.

Q. Did he go inside the house? A. He went inside.

Q. Did he come back out? [511] A. He came back out. He said somebody had been in the house.

Q. Did he state what they had taken? A. He said, "Somebody has took my .25," but he never explained nothing farther.

Q. What time of the night was this? A. I don't know exactly; it was right after we left Shirley's.

Q. Was he drinking that night? A. Yes, sir.

Q. Have you ever been around him when he wasn't drinking? A. Yes, sir, I have been around him several times when he wasn't drinking.

Q. Do you know him real well? A. Yes, sir.

Q. Where did you go after you left Clicker's house? A. After we left Clicker's house we went on to my mother and daddy's and he took me on home and let me out.

Q. Although he said something about somebody had stolen a pistol from him— A. He said a .25. He never said "one."

[512] * * * Q. And he told you if he ever caught her out with anybody he would kill her? A. That's what he said but he was drunk when he said it. He was.

Q. Was he drunk that night? A. Yes, sir, and I wouldn't have asked to ride home with him if I had known, you know, that Stanley was that drunk. But just to look at him he didn't look that drunk, but when he got to talking and after I got in the truck then I knew that he was really loaded.

Q. But he was able to drive out there? A. Well, he run off on the side of the road two or three times.

Q. But he was able to have conversation with Shirley Browning? A. Uh-huh.

Q. And he discussed Joy and Charlie Sue? A. Yeah, they was talking about it.

Cross Examination

By Mr. Scott Daniel:

[516] * * * Q. Now, Mrs. Hillis, on that occasion, I believe you said Stanley was drinking and was drinking rather heavily? A. That's right.

Q. And ran off the road several times on the way back? [517] A. Yes.

Q. And I believe you said that he went by his own house and at that time you saw that the door was open? A. Yes, sir.

Q. Did it appear that the door had been pulled open or had been damaged? A. Well, the door was standing about halfway open and he stopped and he told me, he said, "You stay in the truck. I'm going to see if anybody is in the house or anything." And so he went on up there. I got out of the truck after I waited about a minute and I

didn't hear nothing of him and I walked up in the yard and he come to the door and he shook the door and he said, "Look, somebody has broke in my house." The door was torn loose from the house.

Q. Did he also tell you at that time to stay back while he went inside and left the car running? A. He sure did.

Q. And did he tell you to stay there and if anything happened, if there was anybody inside you were to go and get help right away? A. He told me to go get his father and get help.

Q. And he went in while you stayed back? A. That's right.

[518] Q. And a few minutes later he came out and at that time he told you he had some things that appeared to have been stolen from his house— A. Yes.

Q. —and included in that was a gun of some type? A. He said a .25 but he didn't say what.

Q. And this was the same night that he had previously shown you another gun which you assumed was a .25? A. That's right.

[519] * ** * Q. I believe you testified that you did not hear anyone make a statement of any statements made about Joy to Shirley? A. Stanley didn't make any. The only thing I heard him say, she was talking about them and all and he told her that he didn't want to see her hurt or anything, all she needed was a good tail-whipping.

Q. He was telling that to Mrs. Browning? A. Yes.

Q. He said that he wouldn't want to see her hurt or anything? A. That's right.

[520] * * * Q. Is it not true that on that occasion Stanley seemed strange to you, he seemed confused? A. Well, he was awful upset.

Q. And did you say on one occasion that he just didn't seem to be in his right mind? A. Well, you know, when anybody is drinking they're not, but Stanley just seemed withdrawn.

Q. And did you not say before that Stanley told you about threats some people had made toward him? A. Yes.

Q. And were those threats alleged to have been made —did he not tell you that Sam Faulk and a fellow by the name of Drew had made threats to him? A. Well, he was talking about he had talked [521] to Joy's father on Christmas night and he said that he was worried that he had been—some threats had been made to him that night. And he said he felt like he ought to tell me about it. And he told me he had been threatened by Mr. Pittman and Sam Faulk and a Goosby boy.

Q. Did he tell you exactly what the threats were? A. No, sir.

Q. Didn't you say previously, Mrs. Leathers [sic], that Stanley talked kind of funny on that night and at times would start crying? A. Yes, sir, he did.

Q. And he said at one time as you repeated earlier, "I would love to see Shirley whip Joy for going with Charles," but then he said, "I wouldn't want to see her hurt." A. That's right.

Q. And didn't he also say when you asked him why one moment you want to whip her and the next moment you wouldn't want to see her hurt, did he not reply to that, "I don't want to hurt anybody. I love her. I wouldn't want to hurt her"? A. That's right.

Q. Did you state that Stanley acted like he really didn't know what he was doing? [522] A. Yes, sir, at times he didn't.

Q. And I believe you said that he would say something and then turn around a few minutes later and say something entirely different? A. That's right.

Q. And that he told you he had lost thirty-five pounds— A. That's right.

Q. —that he couldn't eat and couldn't sleep? A. Yes, sir.

Q. And he missed Joy and the children so bad that he couldn't eat at all? A. That's right.

Q. He said he loved her better than anything? A. That's right.

Q. Did he also tell you when he did try to go to sleep at night he was trying to get off his mind and that Vietnam was bothering him? A. That's right.

Q. And did he tell you that he'd been overseas and fought for Uncle Sam and said that he could see Vietnamese people coming at him in his dreams? A. That's right.

Q. And did he tell you that they just kept [523] running after him? A. Yes, sir, he said they was like a bunch of sheep coming in a drove at him, they was just headed at him and he couldn't stop but one to save his life.

Q. Did he tell you, "I just get up and walk the floor"? A. Well, he said he just gets up and walks the floor, he couldn't sleep.

Q. Did he tell you, "I get out in my truck and just drive around"? A. Yes, that's what he said.

Q. On that evening in question when he came into the Waffle House he didn't have any particular place he had been going or was going to? A. No, he didn't have any particular place.

Q. He was just driving around? A. That's right.

Q. And I believe you also personally observed a rather dramatic weight loss of Stanley from the prior summer? A. Uh-huh.

Q. Did it appear to you that thirty-five pounds would be a reasonable estimate of the weight he had lost? A. He looked like he had lost every bit of [524] that much and I asked him how much he had lost and he said, well, as far as he remembered he had lost somewhere around thirty-five pounds or more.

Q. I believe you told me he was awfully depressed or down and out— A. He was.

Q. —that he was like a different person? A. That's right. Stanley just wasn't himself.

Q. And I believe you said before that he would smile and talk to you— A. That's right.

Q. —and now you could ask him about his family or anything and he just wouldn't smile? A. That's right.

Q. And I believe that was more than on just this one occasion but that you had observed him over this period since last summer— A. That's right.

Q. --and that he seemd to get progressively more qiuet over this period of months? A. Yes, he was awfully withdrawn.

Q. He seemed very withdrawn. And I believe you said he appeared to be this way, to be upset physically and depressed emotionally— [525] A. That's right.

Q. —and that you had observed this on the occasion, not just that one evening but over this entire period of time from the last summer? A. Yes, sir.

Q. And you did know Stanley well enough to see him occasionally and speak to him and this type thing? A. Uh-huh.

Redirect Examination

By General Dotson:

Q. Sylvia, along the line of those questions Mr. Daniel asked you, I asked you one or two about Stanley myself, didn't I? A. Yes, sir.

Q. And you told me, "Clicker's not crazy; he just gets mean when he is drinking."

• • • Q. What did you tell me about Mr. Clark's disposition when he started drinking? [526] A. Well, he's just high tempered and gets upset easy.

Q. When he's not drinking there's nothing wrong with him, is there? A. Well, he just—he has seemed nervous for the last year.

Q. When he's not drinking he doesn't have any problems does he? A. I'm not around him really that much.

Q. Well, now, you had to be around him a lot, didn't you— A. Well, I just seen him now and then. I didn't see him every day.

Q. Who gave you all of this information that you just related to Mr. Daniel? A. Well, I was just describing how it was.

Q. Do you ever see anything unusual about him when he is not drinking? A. Well, he is just awful quiet in the last, past year or so.

Q. He has always been quiet hasn't he? A. Well, he stays to himself more than he ever did. He always associated with people more than he has in the past year.

Q. Wasn't Joy Faulk the first person, the [527] first woman he ever dated to amount to anything? A. I don't know; I can't answer that.

Q. You don't know about that? A. No, sir, I don't.

Q. Are you saying that he was so grieved over her seeing someone else—

MR. DANIEL: That's leading, your Honor.

THE COURT: Yes, I think it is.

Q. Did he state why he had lost the thirty-five pounds of weight? A. He said he couldn't eat, he was worried and everything, upset.

Q. Did he tell you what he was worried about? A. Well, he said he was worried over her.

Q. Could you tell whether he was or was not jealous of Joy Faulk? A. Well, he seemed awful worried and all, I'd say that.

Q. And he told you that night though that if he couldn't—if he caught her with someone else he would do what?

MR. DANIEL: Your Honor—

THE COURT: I think this has been covered.

Q. You don't know what his mental condition [528] was on the night of December 30th, do you? A. The night he picked me up and carried me home?

Q. No ma'am, December 30th, six or seven days later? A. No, sir, I don't know because I hadn't been around him.

Q. You don't know what it was a month before he picked you up, do you? A. Well, I just know when I seen him you know.

Q. But you don't know what his mental condition was? A. No. I can't answer that part.

Q. You don't know what it was six months before he picked you up, do you? A. No, he had just seemed withdrawn for a little while.

Q. Has he seemed any different to you since he has been in the courtroom here today? A. I haven't paid any attention to him.

Q. Have you seen him in the last day or two at all? A. Nothing but just through the door there.

Q. Does he look any different than you have [529] seen him in the last six months? A. No, sir.

TESTIMONY OF HENRY CLAYTON GARRETT

Direct Examination

By General Dotson:

[533] * * * Q. Do you remember the week during the week before Charlie and Joy got killed A. Yes, sir.

Q. Can you remember, Clicker Clark coming in your place of business? A. Yes, sir, he came in the store.

Q. What if anything was the conversation you and Mr. Clark had at that time? A. I don't remember anything about a conversation.

Q. Did he have anything with him? A. Yes, sir.

Q. What did he show you inside the store that day? A. A gun.

Q. What kind was it? A. I said it was a .25 automatic.

Q. When I talked to you about it what did [534] you tell me it was?

MR. DANIEL: Your Honor, I don't see the relevance to whatever he said he told him. This is his witness.

GEN. DOTSON: Okay. How did you describe that gun to me, please, sir? A. Well, it was a small little blue steel-looking gun and it had a little thing like a cigarette lighter it looked to me like that you could pull it back on top.

Q. Mr. Garrett, I will lay this in front of you and ask you if that resembles in any way the gun he had that day? A. Well, I never paid the gun a whole lot of attention, never seen it before and I never seen it since.

Q. Does that have something on the top like you were talking about? A. Well, apparently it does.

Q. What caliber gun did you think he had that day? A. A .25.

[535] * * * Q. When was this before the shooting of Joy and Charlie? A. On a Wednesday night.

Q. And they were shot when? A. On a Saturday night, I believe it was.

Q. Did he say anything to you at that time about having had any guns stolen from him? A. No, sir.

* * * Q. Have you had any conversation with Stanley Clark since the night Joy and Charlie were shot? A. Yes, sir.

[536] * * * Q. Did you have a discussion with him about a pistol at that time? A. We had a discussion about a pistol.

Q. What was that discussion, please, sir? A. Well, he said it was a .38 and I said it was a .25.

[537] * * * Q. Mr. Garrett, what was that conversation you had with Clicker Clark over the gun you just mentioned? A. Well, Stanley come in the store one night and he said that I told his brother-in-law that I seen him with a gun.

Q. With what kind of gun? A. A .25 automatic.

Q. And what did he tell you? A. And he said I didn't do it.

Q. What kind of gun did he tell you he had? A. He said he had a .38.

TESTIMONY OF TERRY HILL

Direct Examination

By General Dotson:

[556] * * * Q. Calling your attention back sometime right before Christmas of '78, did you have occasion to buy one or two pistols from anyone? A. Yes, sir.

Q. Where did you buy the pistols, please, sir? A. Charlie's Bait Shop.

Q. Where is that located? A. On the Nashville Highway.

Q. What type pistol did you buy from Charlie's Bait Shop? A. I bought a .25 automatic and a .38 pistol.

* * *

[558] * * * Q. Did you keep that gun in your possession during the entire time or did you do something with it? A. What, that day?

Q. That day or a day or two later. Sometime after that. A. It was the next weekend I loaned it to Clicker, Stanley Clark.

Q. Do you remember when that was? A. It was on a Saturday morning.

Q. Was it before or after Christmas? A. I believe it was the week before.

Q. The week before Christmas? A. Yes, sir.

Q. You are not for sure? Do you know it was before Christmas? A. Yes, sir.

Q. Do you recall what kind of .25 automatic it was? A. It was a Targa, T-a-r-g-a, I believe.

[559] * * * Q. Mr. Hill, when did you let Mr. Clark have that gun? A. It was Saturday morning before Christmas, the weekend before Christmas.

Q. And what kind of gun was it you let him have? A. A .25 automatic.

[560] * * * Q. Did Mr. Clark let you have that pistol back? [561] A. No, sir.

Q. Has he to this day let you have that pistol back? A. No, sir, I haven't seen it since that day.

TESTIMONY OF DR. ROBERT KENDALL

Direct Examination

By General Henry:

[573] * * * Q. Please describe to the jury what you did to perform this autopsy? A. Well, I went through the protocol that I described. I examined externally the body of Joy Faulk.

Q. Explain to the jury what if anything that examination revealed? A. Well, my main abnormalities were around the head, neck, and shoulder region. I found three bullet entry sites, one into the left eye about right here, an entrance wound, and I found the exit wound right back here. I also found a bullet entry here and traced it down and found a bullet lodged.

Q. You are pointing to certain places. If you would please describe for the record where you found these wounds. A. Okay the first and most evident one was the entry in the left eye and then it existed right back here in the right occipital area.

[574] Q. Can you describe the condition of the left eye? A. Well it was replaced with just a big old hematoma. It was just kind of drooping out.

Q. What is a hematoma? A. A hemorrhagic change, just a blood clot.

Q. What is that caused by? A. Well, usually by trauma.

Q. And trauma is what? A. Injury. Injury resulting in bleeding caused by a local area blood clot.

Q. Is that your opinion that the trauma caused the injury to the eye? A. Yes.

Q. Where did you observe the second wound? A. In the cheek below the eye. There was an entry wound here and I followed it down and found the bullet, which extended down the left posterior portion of the back of the neck here, and I was able to retrieve that bullet.

[575] * * * Q. Where was the third wound that you found? A. The third wound was in the left shoulder, right over here and I traced this one across the back and lodged just on the other side of the spine just about level with the shoulder blades.

Q. Was it to the right of the spine or to the left of the spine? A. It went to the right of the spine, left to right.

Q. On what side of the body were all three of the entrance wounds? A. All of the entry wounds were on the left side of the body.

Q. What did you do with the bullet? Did you take the bullet out from the third wound you're talking about in the shoulder? A. Yes, and I also gave that to Dave Grisham.

Q. Did your examination of the cites [sic] of these wounds reveal anything else? A. Yes, they did. There were powder burns around the—especially the one around the eye, and I also found powder burns on the right hand.
[576] Q. Can you, based upon your training as a pathologist to a reasonable degree of medical certainty and in your training, explain those powder burns on the right hand? A. Well, you know, a person when they're defend-

ing themselves they will usually put a hand up. This is not uncommon. You will see marks and, usually if they're righthanded, too, they will use whatever hand is dominant to protect themselves.

Q. Can you give any description of the powder wounds on the hand? A. Well, there were more powder burns on the hand than there were actually around the eyes or the face.

[577] * * * Q. After you complpeted the autopsy of Joy Faulk did you perform an autopsy on Charles Browning? A. I did it immediately after finishing the Joy Faulk one.

[578] Q. Do you refer to the first part of your gross examination as your external gross examination? A. Right, external gross examination. I looked at the body again and I found one bullet entry site right down here below the eye, just a little bit off—about right here.

Q. Would it be fair to say you are pointing to the left cheek bone? A. Left cheek, right.

Q. Did you determine what the bullet did if anything after entering the body? A. It didn't leave the body, we determined that. I went through my gross examination including opening the head and I found that the bullet had entered the lower part of the skull and had also gone right through the center of the brain, again disrupting his brain stem. His central areas of the brain were also obliterated just like Joy Faulk's brain except that his bullet lodged right back here in the right occipital area and stayed in the brain. I removed it and gave it to Dave Grisham like I had the previous bullets on the lady.

Q. Did your autopsy reveal anything else? A. No, he was basically other than that a healthy young man.

Q. Could you describe the area around [579] entrance wound for the jury, sir? A. Okay, he also had some powder burns but also there was a bruised appearance around the actual entry wound.

Q. Based upon your training as a pathologist, then, are you able to offer any opinion about how close this individual was to the gun he was shot with? A. He was quite close.

Cross Examination

By Mr. Scott Daniel:

* * * Q. Doctor, if I understand, what you're saying is that it's your opinion that these victims were shot virtually at point-blank. You said the hand of one was put up and the other one I believe was shot in the head; is that correct? [580] A. They were both shot in the head. If it was not point-blank, it was very close.

Q. The gun was placed right at them and fired right at them, not from a distance? A. Yes, close enough so you could see them very well I am certain.

Q. And you could see the powder burns from the discharge of the gun itself? A. Yes, sir.

Q. So it had to be a very short distance? A. Very close.

FURTHER TESTIMONY OF TERRY HILL

Direct Examination

By General Dotson:

[602] * * * Q. Now, how did that gun get out of your possession? A. How did it?

Q. Yes, sir. A. Clicker came by I believe the following Saturday morning and asked if he could borrow a pistol. He told me his gun had been stolen.

Q. Was this before Christmas? A. It was—yes, sir, it was a day or two before, I guess. It was Saturday.

Q. And you loaned him the gun and what shells were in the clip? A. Yes, sir.

Q. And you don't know how many were in there? A. I don't have no idea.

Q. Did you say at one time it could have been full, you just didn't remember? A. Yes, sir; I don't know.

[603] Q. How many shells did it hold? A. Seven or eight.

* * *

[616] * * * Q. Did you meet Mr. Clark and the investigator at Jerry's Restaurant? A. Yes, sir.

[617] * * * Q. Did Mr. Clark at that time deny that you had loaned him that gun? A. No, sir.

Q. After telling him what kind of gun you had loaned him what other questions did the investigator ask you in the presence of Mr. Clark? A. Well, we just talked about the gun. He asked me where was I at that night, which I told him.

[618] * * * Q. Now, was the ballistics discussed as to whether one bullet matched with the other bullet or not? A. Yes, sir.

Q. What if anything did he tell you at that time in the presence of the Defendant? A. He told me that didn't match up.

Q. Did he tell you where he got that information? A. No, sir.

Q. Do you know why he told you that? A. No, sir.

Q. Did he know that you were going to be a witness in this case? A. I'm sure he did.

Q. Did he ask for anything else connected or related to that pistol? A. He asked me if I had the box, if it came in a box.

Q. What did you tell him? A. I told him that I did.

[619] Q. Did you let him have it? A. Yes, sir.

Q. Did you have it with you at that time? A. No, sir.

Q. How did you get it? A. The next morning Clicker came by and picked it up at my house.

Q. At that time did Clicker deny that he had borrowed your gun? A. No, sir.

Q. 'Till this day has Clicker ever given you any explanation why he did not return that gun to you? A. No, sir.

Q. Have you asked him about it? A. No, sir.

Q. But he has never discussed to you where that gun is at this time? A. No, sir.

Q. Has he ever told you that it was stolen from him? A. Yes, sir, he told me it was stolen.

Q. Did he say when? A. I don't think so. He just told me that it was stolen. I think he mentioned it that night that we talked at Jerry's, it seems like he said something about it. [620] I asked him about it and I think he told me it was stolen.

Q. The private eye asked who? A. Clicker, you know, about the gun.

Q. Did he tell the private eye when it was stolen? A. I don't believe so. He just said, you know, after he borrowed it from me.

Q. But he had never told you that? A. No, sir. I had never questioned him about it.

Q. And to this day he has never told you that? A. No.

Q. But he did not deny that you loaned him this pistol? A. No, sir, not to me because, like I said, I hadn't asked him about it.

Q. And that is the pistol that you bought and loaned to him. A. The serial numbers are the same, yes, sir.

Bench Conference

[774] * * * [THE COURT:] What included offenses, Mr. Daniel, would you suggest that the Court charge upon?

MR. DANIEL: I think, your Honor, that it needs to charge upon all of the homicide offenses.

THE COURT: Even involuntary?

MR. DANIEL: Even involuntary.

[775] * * * THE COURT: You know, I'm supposed to be a criminal law expert and I guess I am because I recognize there are all sorts of inconsistencies and what you might characterize as errors in our present body of law. Now, for example, we have cases holding that you should only charge on included offenses that the evidence really presents and yet there are all kinds of cases in the books saying that all four grades of homicides should be charged on any first degree murder charge. And yet you could never have someone committing first or second degree or voluntary manslaughter and at the same time have the facts constituting involuntary manslaughter as a part of the greater offense because involuntary manslaughter by definition is an accident. And yet there are all sorts of cases in books saying that all four should be charged.

I will charge all four if the defense insists upon it out of an abundance of caution because it would be silly to try this case and make that kind of error and there are cases holding that you are entitled to it.

MR. DANIEL: That's my understanding of it. I understand the argument you are making, I have heard that argued, but at the same time I don't want to fail to request a charge that would—

[776] * * * [THE COURT:] Now, let me ask you this: There has been some rather tangential indication that there might be a drunkenness factor in the defense and of course there is a charge that reduces what would otherwise be first degree murder to no more than second degree in the event of an effect. Would you like that charge?

MR. DANIEL: Yes, I would, your Honor.

TESTIMONY OF DR. JOHN GRIFFIN

Direct Examination

By Mr. Scott Daniel:

[795] * * * Q. Now, Doctor, did you at my request have occasion to examine Stanley Clark? A. Yes, sir, I did.

Q. And what was the purpose of your examination? A. To render a psychiatric opinion.

Q. Now, would you please tell the Court and jury when and where you examined Mr. Clark? A. I saw Mr. Clark in my office on the 4th of June. Then I admitted him to the hospital, Parkview Hospital, on the 6th of June and spoke with him there and discharged him from the hospital on the 8th of June.

Q. So he was actually under your care and evaluation for a period of some four days; is that correct? [796] A. Yes, sir.

Q. Would you tell the jury what your examination consisted of? A. My examination consisted of a lengthy conversation with Mr. Clark, eliciting what information I could from him about his background and about recent events in his life and about events pertinent to his relationship with his attorney. I performed a physical examination on him. I had a psychologist come in to assist me by doing psychological testing and I administered a medication to help put him in a deep state of relaxation so that I could question him some under those circumstances. And I had another psychologist who is experienced in hypnosis work with Mr. Clark in hypnotizing him and asking him some questions while he was in a hypnotic trance. I also had another psychiatrist colleague come in

and assist me with some of the interviews when he was under the influence of the medication.

Q. All right. Now, will you describe to the Court and jury exactly how you went about examining Mr. Clark psychiatrically, step by step? A. I'm not sure what you mean by that question.

Q. Well, the sequence of what you did. A. On the 4th of June I spent approximately [797] two hours with him in my office and at that time the entire examination consisted of a lengthy conversation with him with me listening to what he had to say and occasionally asking me specific questions to clarify information. When he was in the hospital I spoke with him some more in that manner. I performed a physical examination and focused a little more on possible physical problems he may have had in the past. That was on the 6th of June. On the 7th of June another psychiatrist and myself administered a medication that made Mr. Clark very sleepy and that morning we spent approximately two hours with him questioning him particularly about events in relationship to legal proceedings. And later on in the afternoon we came back and did a similar thing, trying to put him into an even deeper state with the medication. We spent approximately two hours then also. The next day, June 8th, I saw him briefly and released him from the hospital. While he was in the hospital the psychologist saw him and administered tests. The other psychologist saw Mr. Clark on two occasions, the last time being this past Sunday when he administered the hypnosis in conjunction with some special type of biofeedback equipment [798] in order to monitor just how deep a trance Mr. Clark was able to go into.

Q. Did you have occasion to see and study the medical or hospital report of Mr. Clark while he was in Parkview? A. Do you mean previous medical reports?

Q. No, the ones during the period that he was hospitalized? A. Yes. In fact, I was the one who contributed most of the information to that. It was my responsibility to fill out the records.

Q. Did you also see and have occasion to study the psychological testing reports of Dr. Michael Campbell? A. I spoke with Dr. Campbell personally and read the written report he submitted to me.

Q. Dr. Griffin, as a result of your examination and your investigation and your history and background—your training, skills, and experience as a psychiatrist—were you able to formulate an opinion as to whether or not Mr. Clark was on December 30, 1978, between the approximate hours of eight and ten o'clock, suffering from a mental illness at that time? A. Yes, I was able to reach an opinion.

Q. What is that opinion? [799] A. My opinion is that Mr. Clark was suffering from depression.

Q. And would you describe what that is? A. Depression can be defined in a number of ways. In the most basic sense it is a mood where one feels very low in spirits, feels worthless, has low feelings of self-esteem, and doesn't care very much about himself or what happens to him.

Q. Are you familiar with the acts Mr. Clark is charged with in this case— A. Yes, I am.

Q. —the acts charged in the indictment? A. Yes.

Q. Now, I will ask you, Doctor, for the sake of your examination and opinion and testimony here to assume

that Mr. Clark committed those acts. Based upon that assumption do you have an opinion as to whether the mental illness that you found was such as to render him substantially incapable of conforming his conduct to the requirements of the law he is charged with violating? A. Yes, sir, I have an opinion about it.

Q. And what is that opinion? A. My opinion is that his mental illness was such that it rendered him substantially incapable of conforming his behavior to the requirements of the law.

[800] Q. Now, Doctor, would you tell the jury whether or not this was a condition that you found to be of long-standing? A. Yes, sir, I think the condition is very long-standing with Mr. Clark and that the condition has periods, depending on circumstances that happen in his life, where he becomes even more depressed than he usually is.

Q. I believe, Doctor, you said while you were evaluating the accused you had him physically hospitalized at Parkview; is that correct? A. That is correct.

Q. I will also ask you if as a result of your evaluation you have an opinion as to his memory. Assuming again that Mr. Clark did commit the acts as alleged in the indictment, do you have an opinion as to whether or not he has any memory or recall of those events? A. Yes, I do have an opinion.

Q. What is that opinion? A. If Mr. Clark committed the alleged acts it is my opinion that he has no conscious recollection of having done so.

Q. Would you give the basis of that opinion? A. I base that on my lengthy conversations with him when he was not under the influence of medication at all and I base

that on the fact that while he was under [801] the medications at no time did he ever indicate in even the slightest way that he had committed those acts. There were times during the interview when I very strongly confronted him with information of the type to where I was trying to really push him to admit. And I tried everything that I ethically could to see if there were any holes in his story or if there were any discrepancies in what he was saying and he steadfastly maintained he did not do it.

Q. Doctor, do you have an opinion as to whether Mr. Clark at the time could have been faking or simulating the condition as to whether or not you would have discovered that? A. Faking that he did not know or faking that he was depressed?

Q. Faking that he did not know of any events such as those charged in the indictment? A. It is my opinion that he was not faking. It is my opinion that he was telling the truth, that he really did not know that he really did not do it—that he believed he did not do it.

Cross Examination

By General Dotson:

Q. Doctor, did you question Mr. Clark about whether he did this or not — an admission on his part that he [802] did would send him to the penitentiary, wouldn't it? A. I assume so, yes, sir.

Q. So did you expect him to admit it? A. In some ways I did, yes.

Q. In what ways did you not? A. In what ways did I or what ways did I not?

Q. You said in some ways you did, indicating there were some ways you didn't expect him to tell you the truth. Now what were those ways? A. Ask me that question again, please.

Q. For the third time, you said in some ways you would have expected him to have told you the truth, indicating there were some ways you would have expected him not to tell you the truth. What were those ways that you would have expected him not to have told you the truth? A. Well, I think what you just said, that he might have been afraid to say that he did it because that would mean that he would go to the penitentiary.

Q. So did he have some reason to tell you he did not do it? A. Yes.

Q. Did he have any reason to admit to you that he did? A. I think so.

[803] Q. What reason would he have had to admit it to you? A. That his attorney could better assist him.

Q. But you just said if he admitted doing it that would send him to the penitentiary and his attorney's position is to keep him out? A. I think there are a lot of mitigating circumstances.

Q. What are those? A. If someone admits that they do something then the attorney can look for some of the reasons and can assist the person's defense.

Q. Or he can look for a different defense, can't he? A. That's true also.

Q. Now you have stated that you examined for the state and for the defendant? A. That is correct.

Q. Have you ever examined a defendant at the defendant's request and testified against him for the state? A. No. sir, I don't think so.

Q. Are you being paid to testify today? A. Yes, sir. [804] Q. Would you be here if you were not being paid? A. No, sir.

Q. You were hired to give favorable testimony for this person, were you not? A. I was hired to give testimony.

Q. Doctor, is it not a fact that of all the psychiatrists that you could take one identical set of facts and another psychiatrist could take the same set of identical facts and you could come up with one conclusion and he could come up with another one? A. I don't think that is a fact, no.

Q. Could that happen? A. It could happen.

Q. Has it ever happened? A. I think so.

Q. Are you familiar with studies that say if two psychiatrists study the same set of circumstances that in sixty percent of the cases they will use different descriptions of the diagnoses? Are you familiar with a study similar to that? A. I don't know that exact percentage, but, yes.

Q. Explain to the jury what that means. A. There were some studies done between [805] psychiatrists who reside in England and psychiatrists who reside in the United States. They were asked to evaluate patients who had certain types of severe symptoms or who had difficulty controlling their behavior and understanding what reality was. And they found that sometimes the psychiatrists said the patients were schizophrenic and that at

other times the psychiatrists would say that the patients had manic-depressive illness. The conclusion of the study was that American psychiatrists tend to use the diagnosis schizophrenia more often and British psychiatrists tend to use the diagnosis manic-depressive illness more often in certain types of persons.

Q. Now, tell us about the studies made among American psychiatrists. A. I don't know of a particular study that you are referring to.

Q. Is it not accepted that the percentage is basically the same in the United States? A. No, not in my opinion.

Q. It is not? A. No.

Q. Doctor, in addition to a psychiatrist you are a physician? A. Yes, sir.

Q. Did you make a physical examination of [806] Stanley Clark? A. Yes, sir.

Q. Did you determine that he did or did not have organic brain damage? A. That's a very difficult question.

Q. If you don't know the answer—did you or did you not?

MR. DANIEL: Your Honor, let him explain his answer.

THE COURT: Yes, Doctor, you may explain your answer.

THE WITNESS: Mr. Clark suffered significant head trauma in 1975 or 1976, I think it was 1976, and he was unconscious for several hours after that head trauma. There were no real obvious residuals from that.

Q. What does that mean? A. He doesn't have any paralysis; he doesn't have any obvious speech impediment; those sorts of things by looking at someone you could tell. But he does have chronic headaches which have been much worse since then and there are syndromes of illnesses described in the medical literature quite frequently whereby people will have a great deal of difficulty with headaches as a result of serious head trauma like that.

Q. What machine did you use to determine [807] that he had chronic headaches? A. I didn't use a machine.

Q. How did you determine that? A. By his statement that he has chronic headaches.

Q. How do you that he has them? Do you know that he was telling you the truth? A. No.

Q. If he was not telling you the truth about that would that have affected your decision in any way? A. If I knew for sure.

Q. Assuming on one hand what he told you was not true about the chronic headaches and on the other hand that that was untrue, that he actually didn't have chronic headaches, would that have entered into your decision as to what his condition is or was December 30th, 1978? A. No.

Q. Why did you make that determination? A. Your question was about organic brain syndrome.

Q. No, sir, we— A. My comments about the diagnoses on December 30th was depression.

Q. Okay, thank you for reminding me. Let's get back to the organic brain damage. I asked you a question

[808] and you asked if you could explain it. I'm not for sure that the jury understood what your explanation was. Would you tell them whether you found that there was or there was not any organic brain damage? A. I think it is a question mark. I can't say certainly he does not have organic brain damage and I can't say certainly that he does.

Q. Had you known that would that have helped you in your evaluation of him, whether he did or did not? A. It could make some things clearer if I knew definitely that he did or did not have organic brain damage.

Q. Did you make a physical inspection of him, examination of him? A. Yes, sir, I did.

Q. Did you find anything physically wrong with him? A. Yes, sir, he has weakness and decreased sensation in his left upper extremity as a result of an injury to a nerve.

Q. Would that affect his brain? A. No.

Q. So that didn't enter in your evaluation of him? [809] A. It was a fact that I noted.

Q. How did that affect what his mental condition was December 30th, 1978? A. I don't think that particular injury had any significance.

Q. So we can completely disregard that? A. If you wish.

Q. Well, did you consider it or disregard it in your evaluation? A. I put together all the information that I elicited from the physical examination as part of my record.

Q. But we're not concerned about from here to down, are we? Aren't we just concerned about what's up here, doctor? A. Sometimes you need to be concerned about what's from here down because we have feelings about what's going on from here down.

Q. Tell me about how from here down on Stanley Clark affected him on December 30th, 1978, as to what was up here? A. I don't know.

Q. You considered it? A. Yes.

Q. How did you consider it in his behalf, [810] favorable to him? A. I considered—my conclusion was that his arm injury had no particular significance to the events of December 30th.

Q. He had this arm injury a month, two months, five months, or six months before? A. Several years.

Q. And he has had it since that time? A. Yes, sir.

Q. And he has had it since he has been here in the courtroom? A. That is correct.

Q. In addition to that did you make any other physical examination of this Defendant? A. That one day was my only physical examination of Mr. Clark.

Q. So physically you didn't see anything about him then that would affect his sanity? A. That is correct.

Q. Now, besides your physical examination and your conversation that you had with him, is there anything you can turn around and face this Defendant and point toward him now and show this jury as to why they would be justified—is there anything physically about him that would let this jury know that he is mentally insane? He's not that way now, [811] is he? A. He is depressed.

Q. But is that a mental illness? A. Yes, sir, it is.

Q. Has he been depressed all of his life? A. Most of his life.

Q. Is there anything you can look at and tell this jury that they can look at this person and see and say as a result of the way he looks that he is mentally insane? A. What do you mean by insane?

Q. Your definition. A. It means different things to different people. Insane is not a word that is defined—

Q. Does he have anything that you can show this jury by looking at him to see a mental illness siting over there? A. They might be able to see some of the features of depression but the best way to tell is to spend a lot of time talking to him.

Q. Doctor, how long after this event was it before you talked with Mr. Clark? A. I first saw Mr. Clark on the 4th of June.

Q. How long was that after the event? A. Well, the event was—

[812] Q. Five months after? A. —on the 30th of December.

Q. Would your evaluation be any different—would it have helped if you had evaluated him in February or March rather than in June? A. I don't think it would have made any significant difference. I'm sure things would have been a little different.

Q. Is it not true that the further you get away from an incident the more likely you are to forget about it? A. Not always; sometimes the further people get away from that type of incident the more likely they are to remember.

Q. In making this determination did you talk with any of his friends? A. No, sir, I didn't.

Q. Did you talk with anyone besides the Defendant? A. I spoke with his attorney.

Q. Were you given any of the facts surrounding this crime he is alleged to have committed? A. Yes.

Q. Did you talk to the Defendant himself about this crime? [813] A. Yes, sir.

Q. Did he give you an explanation as to what his activities were that day? A. Yes, sir.

Q. What did he say his activities were on the day of December 30th, 1978? A. He described getting to bed about two or two-thirty in the morning and rising about six or so that day.

Q. Okay, at that point is there anything there that indicates depression or mental illness? A. Just those facts alone, no.

Q. Then what did he say he did? A. He did some work around the farm that morning. I think he went out and fed some of his sows.

Q. Okay, is there anything there that indicates mental illness? A. The activities *per se,* no.

Q. That coupled with what he did, the prior incident, does those two coupled together indicate a mental illness? A. No.

Q. Then what was the next thing that he did? A. He went to town and did some shopping there. I think he got some floor mats for his car and wanted [814] to pick up some feed.

Q. Does that indicate a mental illness, coming to town and trading as you and I have done? A. No.

Q. Does that taken with the first two that you have described indicate mental illness? A. No.

Q. What was the next thing that he did? A. Well, he drank some more. He had been drinking alcohol since the early part of the day, beer, vodka—

Q. How much? A. It is difficult to say just how much, but over the period from—say, six in the morning—

Q. Why is it difficult to say how much? A. Because I had trouble keeping count. It was—I think it was a minimum of three six-packs of beer per day and at one point he said it was six.

Q. He drank six six-packs of beer that day? A. Yes, sir.

Q. That one day? A. Yes, sir.

Q. And you believed that? A. I don't know.

Q. You had to believe everything he said [815] for you to make a proper and correct evaluation, did you not? A. No, sir, I don't.

Q. What part of that don't you believe? A. Well, when he started talking about the fifth and sixth six-pack he was drinking at apparently around seven, eight, nine o'clock at night, uh—

Q. Wait, we don't have him that far yet, do we? Don't we have him in town buying some floor mats? A. Oh, you want to go back there.

Q. How much had he had to drink until then? A. When he was in town it was kind of late in the afternoon

and by then as best I could tell he reported having drunk three or four six-packs and a bottle of vodka.

Q. Did you believe that? A. Yes, at the time I did.

Q. Do you believe that he could drink that much and function as an ordinary person? A. I believe that he did function—I don't know that it was as an ordinary person.

Q. How much vodka did he drink? A. It was either a half pint or a pint; I'm not sure which.

Q. So by three or four in the afternoon he had had three six-packs of beer and either a half pint or a [816] pint of vodka? A. Yes, sir.

Q. And then what did he say he did? Is there anything there that indicates mental illness? A. Yes, sir.

Q. What was that? A. That type of drinking. Drinking that much alcohol can be a symptom of depression.

Q. I'm not asking about a sympton, though, but that's not in and of itself a mental illness? A. Alcoholism is considered an illness, yes, sir.

Q. But one occasion of drinking that much is not, is it? A. Oh, I think it is.

Q. Then what did he do, Doctor? A. He went back home at five or six o'clock and did some work with the animals, feeding them.

Q. He recalled that? That's not an indication of amnesia, is it? A. No, sir, it's not.

Q. Is than an indication—going back and feeding the animals at the appointed time or the proper time—of mental illness? A. No, sir.

[817] Q. What did he do then, Doctor? A. He watched some television—I think he watched the Hee Haw program—and left the home sometime after seven.

Q. Watching television, that's not an indication of a mental illness, is it? A. No, sir.

Q. Then what did he do? A. He started driving around in his truck and drinking beer.

Q. Did he tell you where he went? A. He went by a tavern; I don't recall the name of it. A lot of those names I just don't know so—

Q. Did you not bring your notes with you? A. No, sir, I don't have them with me.

Q. Is there any reason that you didn't bring them, Doctor? A. I have never taken notes with me when I have testified.

Q. Do you think the jury would be entitled to know just exactly what he told you rather than just what you remember? Don't you think they're entitled— A. My notes are not that comprehensive. I don't tape record my sessions and I don't write down verbatim what someone says.

[818] Q. Don't you think, though, that they would be entitled to that from an expert witness? A. I don't know; that's a legal question.

Q. I'm asking you as your personal opinion as an expert? A. What is the question?

Q. Just what I've asked you, If you don't think they would be entitled to know what you wrote down that would be better than just part of these things that you don't remember? A. I don't think that has particular relevance.

They can find out from other sources just what he was doing that evening.

Q. Do you think they should know that? A. Yes, sir, I do.

Q. Would it help them to know that in their evaluation as to whether you are correct and anyone else is correct? A. Yes, sir.

Q. If that information is available it should be given to them. A. Okay.

Q. Do you agree that it should be? A. I don't think my notes would help, no.

Q. Do you think any information that would [819] indicate what he was doing that night they should have benefit of? A. Yes, sir, I agree with that.

Q. Now, where did he say he drove around? A. He drove around toward Shelbyville.

Q. What did he do in Shelbyville? A. It's very vague as to just what he was doing. His description to me as to what he was doing was vague.

Q. Well, what vague description did he give you? A. His description is that he was drinking beer and he was —in the earlier part of his driving he was looking for an old girlfriend.

Q. This is in Bedford County or Shelbyville? A. That was part of the time he was there.

Q. How much beer had he had to drink up to that point? A. He was at five six-packs and starting on his sixth one.

Q. Then where did he go? A. Just driving around. I don't know the areas that he was describing and there was some confusing statements that he made under the influence of the medication in terms of where he was at a particular point.

[820] Q. So the medication you gave him did affect his ability to think clear and reasonably, didn't it? A. Yes.

Q. So rather than assist this jury in telling us what he was doing, it has put you in a position to say that he was somewhat confused and thereby preventing you from telling the jury what he told you? A. No, it's my opinion that I received—

Q. No, I'm not wanting your opinion; I want to know what he said.

MR. DANIEL: Your Honor, he asks one question and then cuts him off before he can answer it.

THE COURT: Yes, I sustain the objection. Doctor, if you remember the question you may complete your answer.

THE WITNESS: Your Honor, at this point I don't remember what the question was.

THE COURT: Would you like to have the court reporter read it back so you can complete your explanation?

THE WITNESS: Please.

(The last two questions were read.)

Q. Then the medication you gave him did affect his ability to think clear and reasonably, didn't it? A. Yes.
[821] Q. Therefore he was not able to completely tell

you all of the things that he did that night, was he? A. That is correct.

Q. Would it not have helped you, Doctor, for you to have left him in a position so that he could have told you everything that he did? A. Yes, sir, that would have helped my evaluation.

Q. Why did you not do that? A. I tried to. He was unable or unwilling to fill in all of the gaps.

Q. Are you telling me that you questioned a man and he was unwilling to fill in the gaps and you were there to help him? A. I said he was unwilling or unable.

Q. Yes, sir, unwilling or unable. Can you tell this jury which one it was? A. It's my opinion he was unable.

Q. As a result of the medication that you gave him? A. No, sir, I think the medication would have helped him say more than if he had not had the medication.

Q. But it got to a point where after he was in Shelbyville he didn't remember anything that happened [822] after that? A. No, sir, he remembered some things.

Q. What did he remember after that? A. Driving around.

Q. Where? A. Those are the—I don't know the map of the area that well.

Q. Did he not tell you where he drove around? A. He mentioned some of the names.

Q. That's why I say, Doctor, had you written down as you did and brought your notes you could have— A. I didn't write them down.

Q. You didn't feel like it was important. A. It's not in my notes.

Q. You didn't think that was important? A. Most of this was being done when he was under the influence of medication. The other psychiatrist who was with me knows the area better than I do and he handled that part of the questioning.

Q. But a moment ago you said the medication had him confused so he could not reason properly, didn't you, Doctor? A. I don't recall saying it like that, no, sir, I don't.

[823] Q. How did you say it? A. I said the information became somewhat confusing at that point. I didn't say if it was due to the medication or not because I think that more than the medication was involved there.

Q. Where did he say he went after that, Doctor? A. After about eight o'clock at night he described driving around the countryside; no place in particular, and not able—I couldn't follow his itenerary [sic]. And the next thing, the police are behind him somewhere around eleven or midnight. And that's it in terms of his memory.

Q. Does he remember what happened after the police got after him? A. He remembers talking to the police or he told me remembered talking to the police, being puzzled as to why the police had stopped him.

[824] * * * Q. Doctor, did he tell you what he did immediately upon seeing a member of the law enforcement agency? A. No, sir.

Q. Would it have helped your evaluation and determination to have known what he did? A. It would give me more information; certainly that would be helpful.

Q. If it was brought to your attention or if it was proven that just prior—or if one of the facts was that just prior to getting to his house he was in the process of slowing down to turn into his driveway and met—was not being followed but met a policeman and rather than go ahead and pull into his house he sped off past his house—did you have that fact available to you? A. No, sir.

[825] * * * Q. Were you aware of that fact? A. No, sir.

Q. Would that have helped you in your determination? A. It doesn't change my opinion.

Q. If in fact after the police officers turned around and pursued him with the emergency lights on and attempted to get him stopped, would that have changed your opinion at all? A. No, sir.

Q. If upon being stopped he was in a cool, calm manner would that have affected your opinion? A. No, sir.

Q. Doctor, if it were brought to you attention that a week or ten days before this took place he borrowed a .25 automatic pistol, would that have affected your decision? A. I had awareness that he had a pistol.

Q. What kind did he have, sir? [826] A. I don't remember the caliber of it. I just remember that he had a pistol. He told me it was missing from his house, that he had borrowed it earlier in order to protect himself from possible trespassers. He was frightened that someone might hurt him sometimes when he went out in the fields.

Q. Is that an indication of mental illness, self-protection? A. It could be. It could be indicative of being paranoid; I don't think it was in this one instance.

Q. Doctor, if you knew that he had threatened to kill the particular person that he did on three different occasions to her father if he ever caught her out with anyone would that have affected your decision? Did you have benefit of that information? A. At the time I saw him, no, I did not know that he had threatened to kill the deceased.

Q. Would that have entered into you determination? A. Certainly.

Q. If it was shown on a Monday night of the same week that the victim was killed he told one of his best friends, or one of his friends, that if he caught her out with anyone he would kill her—did you have benefit of that information? [827] A. No, sir.

Q. If before that he had been told by this same person that she was afraid for them to be caught by her ex-husband, were you made aware of the fact that he pulled a gun out and said, "We don't have to worry about that"? A. No, sir.

Q. Were you not made aware of that fact? A. No, sir, I didn't know about that.

Q. Were you made aware of the fact that he had threatened her on some other occasions? A. I was aware of the fact that they had fought on some occasions, that their relationship had been stormy, with being together awhile and separated.

Q. Is that an indication of mental illness, disturbance in a family? A. No, sir.

Q. Would these facts that he had threatened someone in the past have helped you in your diagnosis? A. It

wouldn't change my diagnosis; it would have helped in understanding him, yes.

Q. Did you talk to any merchant or anyone who had seen him in [sic] numerous occasions who would have been able to have given you a picture as he was seen by other people—was that given to you? A. No, sir.

[828] Q. Would that have helped? A. Yes, sir.

Q. Did you discuss him with his mother and father? A. No, sir.

Q. Would that have helped you if they had given you some input into it? A. Yes, sir.

Q. Does the Defendant need hospitalization at this time? A. No, sir, I don't think so.

Q. Does he still have the state of depression today that he had December 30th, 1978? A. Yes, I think he is still depressed.

Q. And a state of depression is a mental illness? A. Yes, sir.

Q. Do you have anything to base this depression upon other than what the Defendant himself told you? A. Yes, sir.

Q. What is that, sir? A. My experience in working with people as a psychiatrist.

Q. Forget about what he told you, then. [829] You have had a lot of experience. When you walked in and set him in front of you, did that experience tell you that he was or that he was not mentally insane? It didn't, did it?

Your experience didn't tell you anything when he first sat in front of you, did it? A. No, sir, I had to talk to him first.

Q. So your opinion is based solely upon what he told you. You just applied your experience in coming to the opinion that you arrived at? A. No, sir, that's not correct.

Q. It's not? A. No.

Q. What other than the conversation you had with him? A. The psychological testing by Dr. Campbell.

Q. The psychological testing—is that a question of answers? Is that conversation? A. Partly.

Q. Other than that what is it? A. Written material.

Q. Who answers that written material? A. He does.

Q. Then that is conversation put in the form of writing, isn't it? A. Yes.

[830] Q. What else did you have besides that? A. Well, as a part of that psychological testing there are also abstract figures that are given to a person that they comment on and it gives a lot of information about a person.

Q. Is that comment, though, conversation again? A. Partly.

Q. Doctor, did you have anything that gives you the basis of your opinion other than what you got from the Defendant? A. I had some information that he had lost thirty-five pounds of weight, that he had been doing some strange things with members of his family, that he tried to kill himself. Part of that information was furnished to me by Mr. Daniel.

Q. You don't know whether it's true or not, though, do you? A. I believe it is true.

Q. But if it was untrue, then, your diagnosis could have been wrong? A. No, I think my diagnosis is correct.

Q. Isn't it a fact that no matter what facts that I elicit from you you will not admit to this jury that you could have made a mistake? [831] No, sir, that is not correct.

Q. Could you have made a mistake? A. I could have but I didn't.

Q. You could have but you didn't? A. Yes, sir.

Q. You have no way of being positive, though, do you? A. I'm positive.

Q. Other than you, though, we don't have any way of being positive you are right, do we? A. It is my opinion. It's whether or not you believe my opinion.

Q. Is there anything that we can see, touch, smell, or hear from this Defendant that will show this jury that is mentally insane? Just yes or no and then you can give an explanation. A. No.

Q. There is nothing, is there? A. No.

Q. Okay, Doctor, if a policeman was standing at this scene when this crime occurred, do you feel like this Defendant, had he been the one that did it, would have committed it? A. I don't know.

Q. Now, you have given an opinion about [832] everything else. Is there some reason that you can't give an opinion about that based on the background study you have done on him? A. That's based on predicting.

Q. Would you predict as an expert? A. I'm not an expert in predicting; I'm an expert as a psychiatrist.

Q. All you've done is predicted what he was five or six months ago, isn't it? Didn't you predict? Isn't that what you— A. I have described my opinion as to what his mental state was then.

Q. Don't predict, give us your opinion what he would have done if a policeman or five policemen were standing nearby. A. I suspect he wouldn't have done it but I don't know.

Q. Then he did know right from wrong, didn't he? A. Yes, sir, I think he did.

Q. And he still knows right from wrong? A. Yes, sir, I think he does.

Q. Now, that being the case, how can you say that he does not appreciate the wrongfulness of his conduct?

MR. DANIEL: I don't believe he ever [833] testified he didn't appreciate the wrongfulness—

THE COURT: I sustain the objection. His answer was that he was—

GEN. DOTSON: Yes, sir, I understand.

Q. Then how can you say if there were policemen there he would not have done it and he knows right from wrong but he could not have conformed his conduct to the requirement of law? A. That's based on my opinion. It's based on my evaluation of him where he has absolutely no recollection of doing that and it's based on the fact that he had a very intense relationship with this woman. He

was very depressed and upset as the relationship was breaking up. And I think there were [sic] a tremendous amount of feelings he was holding inside.

Q. But the point I'm asking you, though, is, agreeing that you have given your opinion about his depression and you claim that to be a mental disease or defect and you have said that he knows the difference between right and wrong and that had there been five policemen there he would not have committed the act that was committed, tell me why you can say then that he could not conform his conduct to the requirement of the law. Had they been there he would not have committed this offense and he would not have [834] violated the law as you said he wouldn't. Therefore he could have conformed to the requirement of the law, couldn't he? A. No, I think you're looking at this in an all or nothing manner, and I don't think functioning is all or nothing. He was obviously able to drive a truck; he was obviously able to navigate his way around on the road such that he could come home. There were certain areas of his functioning that he could not control his behavior; there were other areas that same night that he could.

Q. But you're saying though that he knew right from wrong and that if policemen were there he would not have committed that offense. A. That is correct.

Q. All right, forgetting about anything before and after just to that point, then would you say at that time, when the crime was committed with five policement there, he could have conformed his conduct to the requirement of law if there were policemen there? A. He probably would have not—he probably would have conformed his conduct if policemen were there. That's my guess.

Q. That's your guess. A. (Witness nods in the affirmative.)

Q. So now it comes down to the fact that there was or was not law enforcement officers there is why [835] he committed the crime? A. I don't know he committed the crime.

Q. If he did commit it? A. That's a big if; I don't know if he did.

Q. Assuming that he did? A. Okay.

Q. Then he does not meet this second test, then, does he—that he could not conform his conduct to the requirement of law, does he? A. I think he does.

Q. Based on what we have discussed, though, he would not at that point, would he? A. I think he meets the test of being unable to conform his conduct because policemen were not there, if he did it at all.

Q. Okay. Your Honor, I'll apologize for this, but—You said if policemen were there he would not have done it? A. Yes, that's what I said.

Q. And he knows right from wrong? A. Yes.

Q. So at that point he could have conformed his conduct to the requirement of law? A. If policemen were there, yes.

[836] Q. Does that not mean that—not whether they were or they were not—you have just stated at that point that he could conform his conduct to the requirement of law. A. I said that—

Q. Now, why does the absence of those policemen make him unable to do that? A. Because he—

Q. You don't know, do you, Doctor?

MR. DANIEL: Let him answer.

THE COURT: Let him finish.

A. Because he was able to appreciate some things that were going on around him and to control his behavior in that context. Other things he was not able to control his behavior with regard to.

Q. We're not talking about other things, we're talking about— A. I think we're talking about a number of behaviors, not just one.

Q. We're talking about at the time of the crime, sir. That's what we're concerned about, at the time of the crime. A. Yes.

[837] * * * Q. Now, you told Mr. Daniel that he had a mental disease or defect and could not conform his conduct to the requirement of law. Because the Court has already stated that you didn't say anything about to appreciate the wrongfulness of his conduct, we can't get to that. So we're going into something that you didn't bring out before and didn't enter into your evaluation. But you have just stated that if policemen were there he could have conformed his conduct to the requirements of law? A. He might have.

Q. You're saying now he might have. Did you not a moment ago tell the jury he would have? A. I don't remember my exact words.

Q. Does that not indicate then that at that point he could conform his conduct according to the requirements of law? A. It means that his conduct was dependent on the circumstances to some extent.

Q. So if he had a chance to do it and get [838] away with it he would do it and if he couldn't he wouldn't. Is that what you're saying—assuming he committed it? A. That's possible.

Q. That's not mental illness, is it? A. That in itself, no.

Redirect Examination

By Mr. Scott Daniel:

Q. Doctor, what is the mental illness? A. Depression.

Q. And that depression combined with the circumstances had what effect? A. That plus the circumstances could have had the effect that he would have engaged in behavior over which he was substantially impaired in terms of conforming his conduct to the right.

Q. Assuming the circumstances were as we understand them to have been, assuming those circumstances were that there were no five policemen there and none of the type of restraining influences the Attorney General asked you about but rather this is out on a lonely road with no one around, how would those circumstances affect a person with the type of illness you found? A. I would think a person would be more likely to do it there.

[839] Q. Now, is that based simply because of appreciation of police being there? What are you talking about? How do you describe that? A. Based on the fact that that sort of action could be done more safely there.

Q. Now, do you think under those circumstances—not the ones where you have five policemen there—that he would have had the ability to conform his conduct to the

law? Not with five policemen there, but under the circumstances described? A. No, sir, I don't think he had that ability.

Q. Will you explain why, why those circumstances make the difference? A. Because he was a gentleman with very strong, mixed feelings about the woman. The feelings were very strong about the man that she was with, although they were not mixed. There was no love for the man. Because this woman meant so much to him and he saw himself losing her; because he lived such a life of loneliness and depression anyway; and because he had so much alcohol in his system. I think if you put all of that together it could have been an explosive situation.

Q. Did the alcohol that you described produce the illness or did the illness produce the alcohol use? [840] A. I think the abuse of alcohol was secondary to the depression.

Q. What do you mean "secondary"? A. I think he was depressed first and abused alcohol second.

Q. Now, with regard to the type of information you elicited from him and the type of information you used in your evaluation, the type of evaluation you conducted with regard to your interview with the accused, Mr. Clark, is this standard, customary, proper psychiatric procedure? A. Yes, sir, it's proper.

Q. Now, did you go further and make attempts beyond the ordinary psychiatric procedures to determine the knowledge or the recollections of the accused? * * * A. Yes, sir, I went beyond the usual in an attempt to elicit as much recollection from Mr. Clark as I could. To do two

of those medication interviews in one day that I did and then to send somebody to hypnosis too, that is quite unusual to go that far.

Q. Now, in your opinion did the medication interviews produce a realistic and truthful response from [841] the patient as to the questions you were giving him, truthful as far as he was able to tell you? A. Yes, sir, it is my opinion that if Mr. Clark killed someone that evening he has no conscious recollection of it.

Q. Do you have the same opinion about the hypnosis interview? A. I spoke with the psychologist who did the hypnosis and he stated that—

GEN. DOTSON: Object.

THE COURT: Yes, I sustain that.

Q. The Attorney General asked you if he went to you and told you he did it would that have put him in the penitentiary. Now, if he had told you that he did it I believe that information could have been used in his behalf, could it not? A. Yes, sir, that was my impression.

Q. And as a matter of fact, if he had indicated to you that he had done it, it would have made it easier, even more simple, for you to give an evaluation or an opinion as to the psychiatric condition, would it not? A. It has been very difficult evaluating Mr. Clark because I don't know if he did it or not; I have no idea if he did it or not. I do know he maintained all along that he did not do it and he did not appear to me to [842] be lying. That has made my job much more difficult.

Q. So it is your opinion that in the answers and responses and the information that he gave to you he was cooperative in telling you the truth? A. Yes, sir.

Q. At any time during any of those evaluations did he ever indicate, in any way, that he knew anything at all about the deaths or being present at the deaths of the two deceased? A. No, sir.

Recross Examination

By General Dotson:

Q. Doctor, did I understand you to say that you were of the impression that if this was done at a lonely place this type murder could be done more safely? A. Yes, sir.

Q. Is that an indication of insanity or smartness? A. That's an indication that the person is able to think about some of the things that are going on.

Q. Yes, sir. You said some of the circumstances that you gleaned from this person, and you didn't tell us about it before, was that he had strong, mixed feelings about this woman and about the man she was going with, did you not? [843] A. Yes, sir.

Q. That the feelings were stronger about the woman because he loved her and felt like he was losing her? A. Yes, sir.

Q. Is that not consistent with the statement that he could have made, "If I catch her with someone I am going to kill her"? Is that one way of keeping someone else from having her to bother him for the rest of his life if he couldn't have her? A. That's possible, yes.

Q. And you stated that this medication produced a realistic response? A. It's my opinion that he was giving a truthful response. The medication didn't produce it.

Q. But you said a realistic and truthful response? A. That's my opinion.

Q. Did you not state earlier when I questioned you that the medication was such that he got to the point where he couldn't tell you exactly all of the places that he was because he was confused? A. Some of the details that he gave were confusing.

Q. As a result of the medication? [844] A. I don't know that.

Q. Well, how do you know this caused him to give a realistic explanation, then? A. My point is that throughout the entire procedure with the medication that he steadfastly maintained that he did not do that, that he did not do the events that are alleged.

Q. Is it not true that a person with or without medication can steadfastly contend that they didn't do something? Could he not do it under the medication just the same as not being under the medication? A. It's very unlikely but it's possible.

Q. It's possible? A. Yes, sir.

Q. And you said this is a difficult case? A. Yes, sir.

Q. So it's possible that he could have done that? A. It's possible.

Q. So the medication, then, if he was doing it and it didn't affect him would not have caused him to tell the truth, would it? A. No, it wouldn't.

Q. It's possible, isn't it? A. It's possible, true.
[845] Q. And he was there for the purpose of you mak-

ing an evaluation beneficial to him? A. To assist his attorney in his defense.

Q. And his defense is insanity; therefore, I'm not guilty; therefore, I'm to be turned free? A. I don't know that that's his defense.

Q. If it is his defense, though, it would be beneficial to him, wouldn't it? A. Yes.

Q. And he would have reason to lie from start to finish to you about his condition, wouldn't he? A. If he did it.

Q. And you have no way of knowing whether he did or did not do it, do you? A. Not with certainty.

Q. And you have no way of knowing with certainty that he was or was not telling you a lie, do you? A. No, sir.

Q. Did Mr. Clark ever deny to you that he killed those people? A. Yes, sir.

Q. How could he have been in a position to have denied it if he didn't know whether he did or didn't do it? But if according to you he had amnesia during that period of time he wouldn't have known whether he did it or [846] not, would he? A. I'm saying that if he did it he doesn't remember doing it.

Q. But he told you he didn't do it? A. Maybe he didn't.

Q. But he told you he didn't? A. That is correct.

Q. Is that consistent or inconsistent with amnesia during that period of time? A. That's consistent with a number of things.

Q. I didn't ask you about a number of things. Is that consistent or inconsistent with amnesia? A. That would be consistent with amnesia.

Q. Remembering that he didn't do it but not admitting that he did? A. You don't remember that you didn't do something, that doesn't make sense.

Q. Has that not been his defense? A. He said he didn't do it.

Q. He didn't say, "I don't know whether I did or I didn't because I don't remember," he said, "I didn't do it." A. Thats right.

Q. Is amnesia a total lack of memory and therefore if he had had amnesia he wouldn't have known [847] whether he did it or did not do it? A. Amnesia is a lack of conscious awareness.

TESTIMONY OF DR. ROGER WHITE

Direct Examination

By Mr. Scott Daniel:

[856] * * * Q. Now, Doctor, at my request or in conjunction with my request for an evaluation of Dr. Griffin, did you have occasion to examine Stanley Clark? A. I saw Stanley Clark in consultation at the request of Dr. Griffin on two occasions after having reviewed the record at his request for some special evaluation periods that he felt I had more experience with them than he did.

Q. Now, what were those particular areas? A. The two particular evaluation sessions that I had any direct contact with him involved Barbiturate [857] interviews—well, actually the substance used was a drug called Brevital or Methylhexatol, which is an ultra-short-acting Barbiturate similar to Pentothal that's used for an anesthetic. This procedure is most often used in conjunction with court cases now and it at one time was used with emotional trauma in wartime with people on active duty personnel or in combat situations to try to help an individual recall something that they had experienced which because of whatever reason—in many cases emotional pain—they were unable to recall events which had brought about—okay, changes in their function or which led them to be unable to remember things which they needed to be able to remember for whatever reason.

[858] * * * Q. And in what hospital did you see Mr. Clark? A. The Parthenon Pavilion, which is the psychiatric section of Parkview Hospital.

Q. And I believe you also had occasion to study the records of his tests and so forth that were given to him there, did you not? A. Yes, sir.

Q. And I believe those included various physical and brain scan type things? A. And they particularly included psychological testing which Dr. Griffin had requested.

Q. And the psychologicals were performed by Dr. Michael Campbell? A. That is correct, sir.

Q. And I believe you had access to all of these evaluations? [859] A. Yes, sir.

Q. Now, Doctor, as a result of your examination and investigation were you able to formulate an opinion as to whether or not Stanley Clark on December 30, 1978, between the hours of eight and ten o'clock in the evening was suffering from a mental illness? A. I reached a conclusion; I have an opinion on it.

Q. What is that? A. That he was suffering from a mental illness or a psychiatric illness I should say at that time.

Q. And what is that illness? A. It is a serious and rather longstanding depressive neurosis.

Q. Are you familiar with the acts charged in the indictment that are alleged to have been committed by Mr. Clark? A. Yes, sir.

Q. All right, now, assuming hypothetically that he did commit those acts, do you have an opinion as to whether the mental illness that you described was such as to render him substantially incapable of conforming his conduct to the requirement of law that he is charged with violating? A. I have an opinion.

[860] Q. What is that opinion? A. That he was not able to conform his behavior to the requirements of the law at that time, if he did in fact perform those things he's charged with doing.

Q. Assuming again hypothetically that he committed the acts alleged, do you have an opinion as to whether or not he has any conscious recollections of those acts? A. I have an opinion.

Q. What is that opinion? A. My opinion, based on my two rather intense attempts to help him recall any memory of such acts, is that not only does he not have conscious recollection but that he does not have any reachable recollection of any such acts that I was able to elicit with going to unusual means to try to elicit such memory.

Q. And those unusual means were what? A. Those included Brevital interviews on two separate occasions, the second occasion with Brevital being augmented with a rather powerful stimulant to try to put a great deal more pressure of speech to try to avoid assuming that this person had no recollection of certain events that he might be able to cover even with the level of anesthesia or sedation we were eliciting with Brevital. By adding a stimulant to it many times you can uncover memories [861] that a person either consciously or unconsciously does not want to remember. I was not able to elicit any additional information that had not been elicited from this man without any medication at all.

Q. Doctor, do you have an opinion as to whether or not the accused, Stanley Clark, could have faked or falsified his responses to the questions? A. I have dealt with a lot of people who have been in a lot of serious trouble over the years we have talked about. I have had a lot of people

who have wanted to be, if you please, mentally ill to avoid responsibility for acts. I have dealt with people who have worked very hard at building a rather elaborate system of falsehoods to tell me and their attorneys any anybody else involved. And I won't say I absolutely cannot be fooled, but I would be hard to fool. I don't think it is possible for this man to have lied that effectively, and particularly when you consider the fact that with some drugs like Sodium Amytal, which is a similar Barbiturate, if you put a person to sleep with that it's going to take a little while for them to wake up. Brevital is an ultra-short-acting Barbiturate. I can put them to sleep with that and if I get a little too much where they get too sleepy to talk then you wait two minutes and the level of sedation wears off and they are back to talking with slurred speech. [862] A good part of the time that we were interviewing this man and trying to get recollection of things he is charged with doing I was not approaching this at all in a supportive fashion, I was approaching it more from a standpoint of I don't believe you when you say you don't remember things. We were pushing very hard and were running where his speech was very slurred and he was very sedated and I could get nothing with all of this pressure on the man, with Barbiturate and with the stimulant and with a lot of pressure from me, that he hadn't said to Dr. Griffin before that. Dr. Griffin was present for both of these interviews too.

Q. Is it your opinion, then, that Mr. Clark was being truthful in his responses to your questions as far as he was consciously able to? A. It is my opinion that the chances that he was not being honest were about one in ten thousand.

Cross Examination

By General Dotson:

Q. What was your last statement, Doctor? A. I said that I felt that the odds that he was not being honest in his answers to questions under the circumstances that I talked with him were about one in ten thousand.

[863] Q. Meaning that your evaluation is a gamble? A. All evaluations are a gamble. There are two things that are rarely true with human beings; one is never and the other is always.

Q. Are you saying that you can be wrong in your diagnosis? A. I can be.

Q. Have you ever been before? A. Indeed.

Q. How did you determine that you were? A. How did I determine I was?

Q. Yes, sir. A. By other happenings that occurred later, I suppose.

Q. Or happenings that you learned of that happened before your diagnosis possibly? A. Do you mean in all kinds of diagnoses in medicine?

Q. Yes, sir. A. Perhaps in some cases.

Q. You have attested to Dr. Griffin's credentials, did you not? A. Yes, sir.

Q. He is Board certified? A. Yes.

[864] Q. Are you Board certified? A. No.

Q. Have you taken them? A. No.

Q. If he is eminently qualified can you explain why he needed assistance in this case? A. We frequently will

ask for consultation from another psychiatrist, someone else within our field, in any kind of a complex case. But, as I explained earlier, he felt that I had had more experience with Barbiturate interviews and had had more experience with court evaluations than he had.

Q. What he was doing in that area was actually outside his normal practice, wasn't it? A. He has had a fair amount of experience with it. I have had an unusual amount of experience with it simply because of the things I have done over the years.

Q. Apparently he wasn't satisfied with his own ability in that area, though, was he? A. In this case he wanted an additional opinion.

Q. Therefore he wasn't satisfied with his own evluation? A. That is one way of looking at it.

Q. Meaning that he wasn't sure of the [865] evaluation that he was making? A. I don't think it was exactly that.

Q. Well, how was it? A. I think he wanted another opinion to see what opinion another person might reach.

Q. Did you and the doctor reach the same opinion? A. Essentially, yes.

Q. And you were the one that gave him this medication that he took? A. Yes, sir.

Q. Did that medication ever get him confused and disoriented where he could or could not be realistic? A. During the times when he was most sedated when he was approaching what we would call surgical levels of anesthesia he would get slurred and very sedated where we couldn't understand him.

Q. Was it that you just couldn't understand him or that he was unrealistic in what he was saying? A. I don't think unrealistic that I can recall, sir.

Q. Could Dr. Griffin have reached that decision? A. I don't know.

Q. If he did and you didn't would you say [866] that you had a difference of opinion as to that? A. It would appear that that would be true. We don't always agree on everything.

Q. What number of times would you say psychiatrists in general would agree if they were faced with the same set of circumstances as to their ultimate diagnosis? A. Okay, now you are talking about psychiatric diagnoses in general or psychiatric diagnoses in relation to court proceedings?

Q. Is there a difference? A. Yes, sir, there is.

Q. Your efficiency is better in one area than in the other? A. No, but the things that are going on in one area are different from another.

Q. Speaking with relation to cases in court? A. Okay, diagnostically we would probably agree better than eighty percent of the time. Now, when you start adding to that the fact that in court we are dealing with some rules that you all establish—you all meaning the legal profession—and are not psychiatric determinations, and then the amount of differing opinion probably goes up. Partly it can be related to—okay, attorneys or a given court's interpretation of whatever rule applies in regard to responsibility and partly it can apply to the psychiatrist's [867] interpretation, if you please, of the words of a particular rule which apply in the court.

Q. What have you said, Doctor? A. What I have said is—

Q. Just what have you said so this jury can understand it? A. Okay, have they been—

Q. They have just been listening to you— A. Okay.

Q. —so you tell them just what you got through saying? A. Okay, court's have rules that they say a person is not guilty by reason of insanity if such and such things happen. This is determined in at least all of the jurisdictions I am aware of by a judicial edict. Right?

Q. No, sir, not if such and such things happen. A. Or if such and such things are true?

Q. If a certain condition exists? A. Okay, right. Now, the rule which applies in Tennessee is known in court circles or is referred to as the Graham rule or the Graham decision, which was handed down by the Tennessee State Supreme Court about—what, two and a half years ago?

Q. Good enough. [868] A. And it says that a person is not responsible if—okay, the exact wording I won't claim to give, but that a person is not responsible if as a result of a mental disease or defect a person at the time of an alleged offense either lacked substantial capacity to understand that what he was doing was wrong—and I know that's not exact words—or that he lacked substantial capacity to conform his behavior to what the law required. Close?

Q. Doctor, you're coming in here and telling this jury what this person's condition is based upon that you're not telling us that you need to be refreshed as to what

the test is, are you? A. No, but I'm wanting to know if—okay, that's the test as I understand it and I'm asking is that close enough to suit you. I know it's not exact words.

Q. Don't you think that an expert psychiatrist should know what it is? A. The exact words?

Q. Yes, sir. A. That's close.

Q. Do you think you should know, though, what it is? A. That is the test.

Q. Do you think you should know what the test is? [869] A. That I should memorize the exact words?

Q. Yes, sir. A. Not necessarily, no.

Q. Now, the question is in what percentage of the cases would you and a doctor disagree—you have explained it to them a second time and I don't believe they understood it that time.

MR. DANIEL: If your Honor please, I don't like his comments for what the jury understood.

THE COURT: Yes.

Q. All right, without stating whether they did, how many times would you and a doctor disagree on a criminal evaluation for court appearances? A. (Respite) Maybe one out of ten. It depends on who the other doctor was.

Q. Nothing like fifty or sixty percent of the time? You would both agree sixty percent of the time? A. Yes, I would feel we would.

Q. But not ninety percent, would you? A. I think I said ninety percent.

Q. Would you agree that much? A. I think so.

Q. Do you know Dr. Sam Pieper? A. Yes.

Q. How do you feel like he is qualified? [870] A. He is well qualified.

Q. Doctor, would your opinion be the same in this case if you had received information from the Defendant's family as to what his past habits, traits, and conditions were? Could that have affected your decision? A. I knew some of those.

Q. Did you receive any of those that were favorable toward the Defendant being sane or were they all toward his insanity? A. I received both.

Q. Did you receive them from his family? A. Directly, no, sir.

Q. Would it have helped you to have known past threats that this Defendant made toward the victim? A. In this particular case and considering the special nature of my contact with him, probably not. My opinion is based largely on my contact with him and his response to a special form of examination.

Q. Would it have affected your opinion if you had found that this man had borrowed a gun to carry out the homicide? A. It would bother me if I knew he had borrowed a gun to kill someone with, yes.

Q. And that wasn't in it? If you had found that out would that have affected your decision possibly? [871] A. If I had found out this man had borrowed a gun to kill someone with, yes, certainly it would have affected the decision.

Q. Would it have affected your decision to have found out after the death of the victims the gun was disposed of? A. I was aware of the fact that the gun was found sometime later.

Q. Were you aware it was found on the last path the Defendant took just immediately before he was apprehended? A. Yes, sir.

Q. Did that enter into your decision? A. I considered it.

Q. Was disposing of the weapon which has turned out to be the murder weapon in this case indicative of insanity? A. It is not indicative of insanity; it's not exclusive of insanity either. Of course for that matter, I don't know that he's the one that did it.

Q. Would the fact that he attempted to run from the police officers upon being confronted by them have entered into your decision? A. Not in this particular case, considering the special nature of my evaluation here.

[872] Q. Doctor, isn't it possibly true that standing between Stanley Clark and going to the penitentiary was telling the truth or refusing to tell the truth? A. I'm sorry, I didn't understand that question.

Q. Did you understand that Stanley Clark would run the risk of going to the penitentiary for some great period of time if he admitted to you he was responsible for these homicides? A. I would understand that—

Q. All right, do you think—

MR. DANIEL: Let him finish his answer, please.

A. I would understand that he understood that. There is no point in his covering memories with me be-

cause had he had memories which would not have served him I would not have been able to testify for you because of the nature of the fact that I was seeing him as a private psychiatrist. And he was aware it could not be used against him.

Q. Who told him that? A. I did before the interview, and Dr. Griffin had before the interview.

Q. Was he aware of the reason he was to see you? [873] A. Yes.

Q. Is that awareness an indication of insanity? A. I don't recall having said I felt he was insane at the time I saw him.

Q. Is he insane at this time? A. As defined by the court rule, no, sir.

Q. Was he insane six months before this? A. January—I would doubt that his period of insanity as defined by the rule we talked about lasted more than a few hours.

Q. Doctor, would it come as a surprise to you to tell you that you have now just disagreed with Dr. Griffin in your evaluation of this person? A. I would be willing to listen to you as to how it did.

Q. All right, is it consistent with what you have said that Dr. Griffin said the condition that existed in Stanley Clark at the time of the homicide had been existing for some period of time and still exists and now you can say that condition of mental illness does not exist? A. That wasn't what you asked me. You asked me if he was insane.

Q. Is he mentally ill? A. Yes.

[874] Q. Has he always been? A. He has been for a long time.

Q. Is he still mentally ill? A. Yes.

Q. Does he know right from wrong? A. Yes.

Q. Back to the night that this crime took place, did he know right from wrong? A. It is my opinion he did not if he were involved in this, as I was asked in a hypothetical earlier.

Q. Would you be surprised if I told you that Dr. Griffin thought that he did know right from wrong the night this happened? Is that consistent with the evaluation that you made and he made that you say he did not know right from wrong? A. I'm sorry, I misunderstood the question. I would agree with that.

Q. That he did know right from wrong? A. At that time, yes.

Q. Now, then assuming right before this took place there were five policemen there and he knew right from wrong would he have committed this offense? A. If we're assuming—okay—

Q. We're assuming five policemen were there. A. Yes, I think so.

[875] Q. You think so? A. (Witness nods in the affirmative.)

Q. Do you understand my question? A. Yes, sir.

Q. Let me be sure, now. You say that he knows right from wrong? A. Yes.

Q. And now we assume that at the time of the offense there were five people there, five policemen. You are saying based on your study and practice he would have committed the same offense? A. I would say he might have

because this was a control defect in my opinion, not a knowledge or cognition defect.

Q. Now, have you understood that question the two times that I have asked you? A. I think so.

Q. Is there anything about it that you don't understand? A. I don't understand why you're asking it.

Q. Okay, I'm going to ask you: Would it come as a surprise to you to find out that based on the evaluation you made and Dr. Griffin made that you came up with the same result and Dr. Griffin's opinion is he would not have done it? [876] A. Well, I guess we have differing opinions on that.

Q. Which means that out of two doctors we have talked to today one says one thing and one says another and we haven't reached ten doctors yet. Does that mean that you're right fifty percent of the time and he's right fifty percent of the time? A. I don't think we're in basic disagreement, sir.

Q. You realize that it's for the jury to decide, don't you? A. Yes, sir.

Q. So he knew right from wrong and you said he would have gone ahead and committed the crime? A. He might have.

Q. Although Dr. Griffin, the lead psychiatrist in this case, said he would not have? A. I won't change my opinion because of any disagreement, no.

Q. Does that indicate that you and the doctor could be wrong, that you could disagree on some other points? A. I think we could disagree on some other points and still be in basic agreement, sir.

Q. Did this Defendant tell you where he had [877] been that day? A. He described during the sessions where he had been.

Q. Where did he say he went after leaving Shelbyville? A. I don't recall all of the various places or the exact path that he took.

Q. Was he very clear and precise on them? A. Yes.

Q. Do you know why Dr. Griffin said he was not? A. Well, I'm a little better acquainted with that end of Bedford County than he was.

Q. We're not talking about where he actually said he went. The doctor said there was a point where he was confused as a result of the medication. Now you're telling us that he remembered specifically where he went? A. In my opinion he remembered the places. While I can't sit here and give you a precise he went here and then here and then here—

Q. Does this— A. Let me finish, please. —from knowing some of the roads and some of the area, where he was saying he was going from one place to another was some place you could go and that would be the next place you would come to, [878] like from Shelbyville to Wartrace to Bell Buckle. That wouldn't have made very good sense to Dr. Griffin because he is not acquainted with that area at all.

Q. Well, you have stated that he had no trouble telling you where he went. Dr. Griffin stated that some of the places he wasn't clear about, the medication had him confused. I'm asking you now if you and Dr. Griffin disagree

on how well he remembered where he went? A. Apparently we do.

Q. Is that another point where you and the doctor disagree? A. That has nothing to do with the ultimate opinion.

Q. Does the matter of whether this man told you the truth or told you a lie have anything to do with the ultimate decision? A. It has something to do with the jury's ultimate decision.

Q. I'm talking about yours, your decision as to your opinion? A. My opinion is based on observing this man, listening to him, and my experience. And I have given you that. You know, can I absolutely guarantee you that I am a hundred percent right a hundred percent of the time, no, I've said earlier.

[879] Q. Doctor, had this man been lying to you from start to finish, even though it's your opinion he was not, would your opinion be wrong? A. If he had been lying to me from start to finish even though it is my opinion he was not and could not under the circumstances, then my opinion would be wrong, yes, sir.

Q. So therefore this jury is to take your opinion which is based on your experience but that experience only helped you in evaluating this Defendant and your evaluation is based upon what he told you? A. And on my experience and my observing him and listening to tone of voice.

Q. Point out on this Defendant what it is that this jury can see about him that indicates he has a mental illness? A. Right now?

Q. Yes, sir. A. Nothing.

Q. Is there anything that they can see, hear, touch, or smell about this Defendant indicating mental illness? A. As he sits there right now, no, sir.

Q. Did he have organic brain damage? A. He may have.

[880] Q. Would that have affected your decision? A. In this case, no.

Q. Did he or did he not? A. Have organic brain damage?

Q. Yes. A. That's plus or minus in my book. I can't—I don't know. He doesn't have serious organic brain damage like someone who has had a stroke or had half their brain knocked out might have. He may have some. Is this enough in itself to—

Q. —affect your decision? A. No.

Q. Does he have organic brain damage? A. I answered that already.

Q. What was your answer? A. It was he may have some.

Q. Is this again where you and Dr. Griffin disagree if he said he didn't have any?

MR. DANIEL: If your Honor please, he didn't say that at all.

THE COURT: I sustain the objection. It's up to the jury to determine what the proof was.

Q. Doctor, you don't know how much you and Dr. Griffin really agree on this except the bottom line, that he

• • •

was mentally ill and that mental illness is—what? [881] How do you define it? A. What, the depressive neurosis?

Q. Yes. A. It's defined as a psychiatric disorder which is a mood disorder. It has to do from an unconscious basis with difficulty in handling anger, frustration, a difficulty in externalizing feelings which a person tends to turn in against themselves under most circumstances.

Q. In your interview with him and Dr. Griffin's interview with him did I understand you to say that he has got amnesia? A. General, if he did what he is charged with doing—which I have no way or knowing one way or the other—then he has amnesia for it.

Q. Can amnesia be faked? A. It can, but not very often and not very effectively.

Q. Did this Defendant ever deny committing the crime? A. Yes, sir.

Q. Is that an indication of amnesia? A. Not necessarily. You know, if he didn't do it, it would just be a statement of fact. And I don't have any way of knowing which might be the case.

Q. You don't know whether he did or didn't, [882] do you? A. No, sir, I don't.

Q. Other than on your experience you have no way of knowing whether he told you the truth or not, do you? A. That is correct.

Q. What is called prison psychosis? A. That is Ganser syndrome. Ganser syndrome is a hysterical malfunction which a person under a great deal of stress, if you

please, acts too crazy to be crazy. You may ask a question, you get answers but they are totally wrong but they have some bearing to what the answers should have been. These are wildly disorganized appearing people who become very organized again as soon as the heat is off them so to speak.

Q. Everything you observed about this Defendant was ordinary except what he told you? A. Everything was ordinary, yes, except—

Q. And you have no way of looking into his brain and telling whether he was telling the truth or not; yes or no? A. No.

Redirect Examination

By Mr. Scott Daniel:

[883] Q. Doctor, do you have ways of trying to get at the truth? A. I always try to get at the truth.

Q. Is that one of the functions of a psychiatrist? A. In relation to pre-trial evaluations, regardless of who requests it, that is a function of a forensic psychiatrist or a psychiatrist who is going to evaluate people who are involved in court actions be they civil or criminal.

Q. And as part of that function is it your duty and responsibility to determine whether he is lying or telling the truth? A. It is my responsibility to reach an opinion and communicate that opinion to whoever is asking for it, be it the court or be it an attorney or whoever.

Q. And as part of your experience and practice and your evaluation of this man I believe you said you formed an opinion? A. I formed an opinion based on my observation and my experience.

Q. And that opinion was what? A. That opinion was that this man has and [884] does suffer from a psychiatric illness or mental illness if you please, a form of depression which can influence and affect a person. And on the date in question which he is charged with committing certain acts, that if he did them, in view of the fact that I was unable to elicit any memory of contact, conflict, or the like, it was my opinion that he was sick enough at that time in assuming that he did do these things that he has buried all knowledge, memories, recollection of this deeper than anyone I have ever examined in the—what, twenty-one years or so I have been dealing with people in trouble.

Q. Now, Doctor, do psychiatrists normally make their determinations based on what they can smell— A. No, sir.

Q. —or touch? A. Not generally.

Q. Is the method of evaluation that is used by you and Dr. Griffin, talking to the patient and evaluating his responses and observing the way he talks to you as opposed to the way he sits and responds to your questions, is that proper and customary psychiatric techinque [sic]? A. Yes, sir.

Q. Doctor, did you make your evaluation and your opinion and present your testimony here the same way that you have when you have testified on behalf of the [885] prosecution against the Defendant? A. Yes, sir.

Q. And you have done that on few or many occasions in the past? A. A few hundred I suspect by this time.

Recross Examination

By General Dotson:

Q. Are you telling this jury that you have testified in these kind of cases a few hundred times? A. Not murder trials but in Criminal Court.

Q. How many would you consider to be a few? A. Two or three hundred.

Q. Three hundred cases? A. Probably.

Q. Over a period of twenty years? A. Twenty-one now, I'm sorry to say.

Q. So that would be how many cases a year? fifteen? A. Yes, sir, if you realize that one year was heavily loaded and during that time I was doing almost exclusively that.

Q. Were you wrong in any of those cases? A. It depends on how you define wrong. Was I on the losing side? On some of the cases, yes, sir. The [886] jury didn't always agree with me.

Q. Did this Defendant tell you that he attempted to elude the police that night? A. I don't recall asking him.

MR. DANIEL: If your Honor please, he's not going into cross-examination; he's going outside the scope.

THE COURT: Yes, I allowed you some latitude but I'm going to be harder on the General. General, let's confine it to his redirect.

Q. You said this was a highly unusual case? A. I don't know that it's a highly unusual case—

Q. That you've never seen—

MR. DANIEL: Let him finish his answer, please.

GEN. DOTSON: He answered; he said he didn't know.

MR. DANIEL: He was still talking when you cut him off.

GEN. DOTSON: It wasn't responsive.

THE COURT: Doctor, do you want to say anything further about that question?

THE WITNESS: As criminal cases go that I have been asked to see, no, I wouldn't say it is a highly [887] unusual case. It is unusual in the findings.

Q. And it is possible that this Defendant had the faculties and the abilities to withhold everything he withheld from you? Yes or no? A. In my opinion, no.

Q. That is your opinion, but medically would it have been possible? A. General, my opinion is that it is not medically possible for him to have withheld the material that I was looking for and which I have said I was unable to get. If I did not feel it was medically impossible I'm sure Mr. Daniel wouldn't have asked me to have appeared today. But that's my opinion. Can I prove it chiseled in stone somewhere? No, I can't, sir.

Q. That's what I'm asking; so we have no way of knowing, do we? A. No, sir.

REBUTTAL TESTIMONY OF TERRY HILL

Direct Examination

By General Dotson:

[901] * * * Q. Mr. Hill, you have previously testified and you are still under oath. How long did you testify you have known Stanley Clark? A. About twenty-five years.

[902] * * * Q. Have you known him long enough to have an opinion as to whether Stanley Clark knows right from wrong? A. Yes, sir.

Q. What is that opinion? A. That he knows right from wrong.

Q. Have you known him long enough to know whether he is able to control his emotions and faculties such that he would or would not violate the law? A. Yes, sir.

[903] * * * Q. Do you feel like you know him well enough to say whether he has been able to control himself to keep from violating the law or not? A. Yes, sir.

Q. And what would that be? A. Yes, sir, I believe so.

Q. You believe so what? A. I mean, I felt that he was all right or I wouldn't have loaned him the gun.

Q. If you ever thought he had a mental problem you would not have loaned him that gun? A. No, sir.

Cross Examination

By Mr. Scott Daniel:

[904] * * * Q. Isn't it a fact that you really don't know what his mental state or what his thinking or thoughts are anything more than just superficially when you happen to meet him? A. That's about it, I guess.

Q. And you don't know whether he was mentally upset or in a depressed state just from the short occasions when you would pass the time of day; isn't that true? A. Yes, sir.

Q. And that is about the sum and substance of what you know about Stanley and his condition during these past four or five years; is that correct? A. Yes, sir.

Q. I believe you have noted though that he has had a rather substantial loss of weight, has he not? A. I really hadn't noticed. I know he has since the first of the year but other than that—

[905] Q. You don't remember when he was losing weight? A. No, sir.

Q. But you do know that he has lost a lot of weight? A. Yes, sir, like I say, the last few months I know he has.

Q. And you know also I believe that—you're not saying that he didn't lose weight before then? A. No, sir, I didn't say—

Q. You didn't pay any attention to him? A. No, sir.

Q. And the fact is you weren't close enough or seeing him enough to pay attention to much of anything about him up until after this happened, were you? A. Yes, sir.

Redirect Examination

By General Dotson:

Q. Did you say you noticed the weight loss since the first of the year? A. Yes, sir, since this has come up.

Q. Mr. Daniel asked you the association you had with him, has not Mr. Clark visited in your home? A. Yes, sir, I have seen him.

Q. In your home? [906] A. Yes.

Q. You have drank beer with him? A. Yes.

Q. You have been out with him? A. Well, not that much, I mean, we've seen each other—

Q. But you have some? A. Yes, sir.

Q. And you have been in his house? A. Yeah.

Q. On more than one occasion? A. Yes, sir.

Q. As a matter of fact you saw him for a period of two hours this month? A. Yes, sir.

Q. Did you notice anything different about him during any of these times? A. No, sir.

Q. Is he the same Stanley Clark that you have known since childhood? A. Yes, sir.

Recross Examination

By Mr. Scott Daniel:

Q. Mr. Hill, on these occasions when you have seen him, these were just short occasions and not in-depth [907] discussions of his problems or his feeling or his thinking or his emotions, were they? A. No, sir.

Q. Just very informal and very light conversation-type things; is that correct? A. Yes.

Q. And you couldn't say whether or not Stanley has been disturbed or whether he was depressed; you don't

know anything about that, do you? A. No, sir, I knew nothing about it.

Q. And you know nothing about what his condition has been and you didn't pay attention to him and until all of this came up you didn't have any occasion to go out with him or do anything at all, did you? A. No, sir.

Q. I believe your association on the few occasions that you have seen and talked with him have just been under circumstances where there was no opportunity or no occasion for any talking about any feelings or problems or in-depth type thing, hasn't it? A. Yes, sir.

Further Redirect Examination

By General Dotson:

[908] Q. If he had these problems he made no outward manifestation of them and discussed them with you, did he? A. No, sir.

REBUTTAL TESTIMONY OF LOYALL PITTMAN

Direct Examination

By General Dotson:

[909] * * * Q. Mr. Pittman, how long have you known the Defendant, Stanley Clark? A. I have—I suppose being acquainted with [910] him and seeing him in the community about six years or thereabout. It may have been a little longer.

[911] * * * Q. Do you think you got to know him well enough that you could say whether he knew right from wrong? A. I believe so.

Q. What would you say as to whether he did or didn't? A. I think he knows right from wrong.

Q. Have you ever seen him at a time when he was unable to control himself? A. No, sir.

Q. During the six years that you knew him and the last three years that you got to know him better, did you see any major changes to indicate that he was any different in the last part of '78 and the first part of '79? A. Not that was noticeable.

[912] Q. You didn't notice anything different? A. No, sir.

Q. Do you feel like he was of sound mind? A. I believe so, in my opinion.

REBUTTAL TESTIMONY OF STANLEY BROWNING

Direct Examination

By General Dotson:

[913] * * * Q. Do you know the Defendant in this case, Stanley "Clicker" Clark? A. Yeah.

Q. How long have you known him? A. I have known him several years; I couldn't say right off how many.

Q. One? two? three? four? A. I guess twelve or fifteen years.

* * *

[916] * * * Q. Do you have an opinion as to whether during the time you have known him that he knew right from wrong? A. Yes, I would say he knows right from wrong.

Q. Have you know him to be able to control his faculties and thinking and such that he doesn't violate the law since you have known him? A. Yes, he can control it.

Q. Do you see anything that would lead you to believe that he was mentally ill or insane? A. I have never seen nothing that would.

Cross Examination

By Mr. Scott Daniel:

[917] * * * Q. When was the last time that you talked with Stanley any more than just to wave or say hi? A. Well, I don't really know what day it was. Like I say, I didn't keep up with it or nothing.

Q. January? February? March? April? May? June? July? A. Well, if you can find out when he bought that new truck, he come over there right after he bought that new truck.

Q. That would have been way back in 1978, wouldn't it? A. Yeah.

Q. And that's the last time you saw him and talked to him? A. As far as I know, yes.

REBUTTAL TESTIMONY OF EDDIE PEEL

Direct Examination

By General Dotson:

[918] * * * Q. Have you gotten to know the Defendant, Stanley Clark, in any way? A. Yes, sir, I have known him for twelve or fifteen years.

Q. Have you ever had occasion to talk with him? A Some, yes, sir.

Q. Based upon what conversation you have had with him do you feel like this Defendant knows right from wrong? A. Yes, sir.

Q. Do you feel like he has been able to conduct himself so as not to violate the law and get along in the community okay? A. Yes, sir.

Cross Examination

By Mr. Scott Daniel:

[919] Q. Mr. Peel, when was the last time you talked with Stanley? A. I couldn't tell you.

Q. About when? A. Around a week before Christmas of 1978.

Q. And when was the last time before that? A. I couldn't even say.

Q. So it hasn't been very often, has it? A. No, sir, not a whole lot.

Q. And when you did talk it was just very short, not in-depth conversation, wasn't it? A. Yes, sir.

Q. So you really don't know what his mental state or what he was thinking about inside was, do you? A. I wouldn't have any way to know what he was thinking, no sir.

Redirect Examination

By General Dotson:

Q. He had no occasion to express it to you if it was anything bad, did he? A. No, sir.

Recross Examination

By Mr. Scott Daniel:

[920] Q. He wouldn't have any reason to express it to you, would he? A. Not that I know of.

REBUTTAL TESTIMONY OF LINDY WOODSON

Direct Examination

By General Dotson:

[921] * * * Q. Do you know the Defendant, Stanley Clark, as a result of living in that community? A. Yes, sir.

Q. And you have known him for how long? A. Twenty five or more.

[922] * * * Q. Do you feel like you have gotten to know him fairly well? A. Yes, sir.

Q. During this twenty-five year period of time have you seen any major change in the way he conducted himself? A. No, sir.

Q. Has he always been the same Stanley Clark? A. Yes, Sir.

Q. Do you feel like he knows the difference between right and wrong? A. I believe so.

Q. Do you feel like he knows how to conduct himself according to the law? A. Yes, sir.

Q. Did you see him before December of '78? A. Yes, sir.

Q. How often would he come in your store? A. Oh, every day or two.

Q. Have you seen him any since December of '78? A. Yes, sir.

[923] Q. Where? A. Well, at the store or out at my daddy-in-law's; around in Fosterville.

Q. Have you noticed any change in him since December of '78 different from what it was a year and five years before? A. No, sir.

Q. Do you feel like he knows right from wrong— A. Yes, sir.

Q. —and he can conduct himself according to the laws of the county— A. Yes.

Q. —and the state? A. Yes.

Cross Examination

By Mr. Scott Daniel:

[924] * * * Q. And he just comes in there to get groceries — A. (Witness nods in the affirmative.)

Q. —And he doesn't sit down and tell you how he thinks or about his love life or his family or anything else? It's just a business transaction, isn't it? A. Mostly, that's right.

Redirect Examination

By General Dotson:

Q. He never told you that he was having any problem with all of that, though, did he? A. No.

Recross Examination

By Mr. Scott Daniel:

[925] Q. He wouldn't have any reason to tell you, would he? A. I don't know of any.

REBUTTAL TESTIMONY OF DR. SAMUEL PIEPER

Direct Examination

By General Dotson:

[930] * * * Q. Doctor, just recently did you have occasion to make an evaluation of Stanley Clark? A. Yes, sir.

Q. Is that the person present in the courtroom today? A. Yes, sir.

[931] Q. Where is he seated? A. He's the gentleman on my left side at this table here.

Q. Prior to getting into that, let me ask you, Doctor: As an expert in this field, if two psychiatrists have the same set of facts what percentage of the time do you feel that they will come up with the same evaluation? A. It depends on the setting in which you gain these facts. If you take a group of psychiatrists and set them down in front of a television set where they are watching a patient being interviewed by somebody else, the best you can hope for is somewhere between eighty percent and sometimes it might get as high as ninety percent, but usually around eighty percent is about the best agreement you are going to get.

Q. Is that a standard, closed interview? A. Yes, sir.

Q. And what if a person went into your office and the next office and the next office and these psychiatrists interviewed him individually, not in a standard, closed setting? What would you say that percentage would be? A. It would be more like fifty to sixty percent agreement.

Q. What you are saying is that two [932] psychiatrists can see the same thing and come up with completely

different opinions? A. Yes, sir, because the diagnosis—psychiatry reflects not only the facts that you see but it also reflects your theory about the cause of the disorder and it also reflects your ideas about the treatment of the disorder.

Q. Although you rely upon your past experience and other psychiatrists do too, most of your information for your diagnosis is based upon what the Defendant tells you himself, isn't it? A. Yes, sir.

Q. And if he is telling you a lie you could come up with wrong diagnosis, couldn't you? A. Yes, sir.

Q. Now, assuming that he told you the truth and told another psychiatrist the truth and the facts were identical, it would be possible for you to come up with one conclusion and the other psychiatrist to come up with a completely opposite conclusion? A. Yes, sir.

Q. Psychiatry is no more exact than that, is it? A. That's true, yes, sir.

Q. And you don't like to have to say that [933] about your profession, do you? A. No, sir, because I feel like from one patient to another patient I'm very consistent and, you know, and I am satisfied that what I do is right and it fits for me. But across the profession there is considerable difference.

Q. Back to my question: Did you do an evaluation of Stanley Clark? A. Yes, sir.

Q. What was the nature of that evaluation? A. Somewhere about the end of June or the early first part of July I received a call from you asking me if it were

possible for a psychiatric evaluation to be done on him and I replied that I would be happy to do it if this is what the fellow that I was working for at the forensic service division wanted me to do. And you arranged through the Court for this evaluation to be ordered.

Q. Tell us the nature of the evaluation. A. This evaluation consisted of having Mr. Clark come to the Forensic Service Division. Two of your investigators had come in and given us the facts concerning this issue. Then we talked with Mr. Clark for approximately an hour and a half. The next day he came back and had skull X-rays and an EEG and a psychological testing and I talked with [934] him for perhaps ten or fifteen minutes at that time.

Q. Did you make a determination at that time as to whether the Defendant, Mr. Clark, was suffering from or had sustained any organic brain damage? A. Our testing did not reveal any evidence of organic brain disease.

Q. As a result of that evaluation did you form an opinion as to whether Defendant Clark currently is mentally ill? A. Here I would like to explain to you the difference between mental illness—if you mean was he suffering from a diagnosis in the statistical manual of psychiatric diagnoses, yes, sir, I would have to say yes.

Q. You would have to say yes to what? A. That he was suffering from a disorder within the manual, listed in that manual.

Q. At the time you examined him was he competent to stand trial? A. Yes, sir.

Q. As a result of that evaluation did you form an opinion as to whether he lacked a substantial capacity to

appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law? A. Yes, sir, I formed such an opinion.

Q. What was that opinion, sir? [935] A. That he did not lack that capacity.

Q. And what about being able to conform his conduct to the requirement of law? A. He was able to conform his conduct.

Q. As it relates to the night or December 30th, 1978— A. Yes, sir.

Q. —or on any other day? A. Yes, sir.

Q. Doctor, without stating what he told you, now, during your evaluation did you find out that there was any period of time during December 30, 1978, that there was a period of time that the Defendant did not remember anything? A. No, sir, he was very clear that he recalled starting early in the morning and carried it right through the entire night up until the next morning.

Q. Was the Defendant made aware of the fact that Dr. Griffin said he had had amnesia for a time during December 30th, 1978? A. Yes, sir.

Q. And what was his response to that? A. He disagreed because he said he knew where he was and what he had been doing.

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[937] Q. Doctor, can amnesia be faked? A. Yes, sir.

Q. Doctor, if the psychiatrist's evaluation is based solely and alone on what the Defendant tells the psychiatrist—do you follow my question? A. Yes.

Q. If the evaluation is based solely and alone on what the Defendant tells the psychiatrist, is there any positive way you can tell whether the Defendant—

MR. DANIEL: Your Honor, he is leading so much it's just—.

THE COURT: Go ahead and finish your question.

Q. —is there any way you can tell the Defendant is or is not telling the truth? Before you answer I would like to respond, Your Honor, the question does not indicate that I am looking for a particular answer.

THE COURT: Yes, the question is proper. You may answer it, Doctor, if you remember what it was.

A. If I understand the question, if somebody comes in and tells you something is there any way you can know whether he is telling you the truth or not. And the answer to that is if you have some other way that you can [938] compare what he tells you with what actually happened then you can know.

Q. Let me rephrase the question, Doctor. If your evaluation is based solely and alone upon what the Defendant tells you, solely and alone on what the Defendant tells you, is there any way to tell whether he is telling the truth or not? A. If he consistently tells you one and the same story then there is no way you can tell whether it is the truth or not. If it is internally consistent, that is if it is always the same then you can't tell whether it's the truth or not. If he tells two different stories, you know, then one of them is not right. But if it's always the same you can't tell whether it is the truth or not.

Q. Can a person know whether he has or has not done something if he had amnesia at the time of the event? A. If a person has amnesia, they don't remember what they did and they can't know what they were doing during that period.

[939] * * * Q. If a person has true amnesia is there any way that he can honestly answer the question as to whether he did or did not do something during that period of amnesia? A. If he doesn't know what he was doing during that time he can't say, "I did it," or, "I didn't do it."

Q. Doctor, is there any medication that will make a person give up amnesia, whether it be real or faked? A. At a hundred percent level, no.

Q. What is the purpose of hypnosis and [940] truth serum in psychiatry? A. There are a great number of uses of hypnosis. Truth serum is used primarily to relax inhibitions is a way of saying it. It doesn't mean much to other people—it's like—well, I expect you are familiar with people who have had operations and in the process of recovering from the anesthesia they become wild and talk a lot and talk out of their head and they don't know what they are saying. And you have known people who get drunk and who like to talk while they are drunk. When you give truth serum you put a person in a state where they are really not completely aware of what they are saying and you stimulate them and get them to talking in the hopes that they will tell you something that they would not otherwise tell you and they—you have no guarantee that what they tell you is the truth. You just hope to get them to talking because perhaps you can get something that will lead you to what the truth is.

Q. What is your feeling upon the usefulness of hypnosis and truth serum? A. I have used both in the past but I, you know, don't consider them of enough value that I continue to use them.

Q. Will they cause a person to tell the truth? [941] A. No, sir.

Q. Was your evaluation such that you could have an opinion as to whether Defendant Clark knew right from wrong on December 30th, 1978? A. Yes, sir.

Q. What about on any other date prior to and after that, is your opinion such that he would know right from wrong? A. Yes, sir, my opinion is he knew right from wrong on that day, before then, and after that.

Q. Can you tell us if his background is consistent with a mental disease or disorder? A. I don't know exactly what you mean when you say background. You can start with his childhood and come on forward.

Q. Did you find any period of mental illness from his childhood up until that time? A. No, sir.

Q. Doctor, if in fact— A. Pardon me. Once again you get to that question you asked me about before about mental illness. I'm going to have to say there was a diagnosis that I could use that is in the diagnostic and statistical manual.

Q. But was that such it would have prevented the Defendant from lacking a substantial capacity [942] to appreciate the wrongfulness of his conduct— A. No, sir.

Q. —or to conform his conduct to the requirement of law? A. No, sir.

Q. Doctor, assuming for the moment that the Defendant committed the crime that he is charged with, is it your opinion that if five policemen were standing at the scene immediately before it happened that he would or would not have committed this crime? A. He would not have done it.

• • • Q. Doctor, the two tests again are whether he appreciates the wrongfulness of his conduct or whether he is unable to conform his conduct to the requirement of law. Now, did you find anything wrong with the Defendant that would prevent him from being able to do those two things? A. No, he was able to do those.

[943] • • • Q. And if he committed this offense whether anyone was or was not present, he would have known it was wrong at that time? A. Yes, sir.

Q. Doctor, I will pose a hypothetical to you. If an average person of Stanley Clark's size and stature consumed six six-packs of beer to seven six-packs of beer and a half a pint of vodka in one day's period of time, what effect would that have upon his ability to reason and to think or what effect at all would that have upon him? A. Six six-packs of beer?

Q. And possibly seven six-packs of beer. A. That's forty-two beers and that is about, roughly thirty-two pints, which is about sixteen quarts, which is about four gallons. Fluidwise, it's pretty hard simply to drink that much fluid in the course of a day. In terms of the alcohol, about six percent alcohol which is twenty-eight, somewhere between twenty-eight and thirty ounces of alcohol is the equivalent of two quarts of whiskey. If you drink two quarts of whiskey in the course of a day you're approaching the

lethal amount of alcohol. With that amount of fluid plus that amount of alcohol, you would be extremely sick.

Q. Is it your opinion that that would be physically impossible to do? [944] A. Well, I can't say it's impossible but it seems very unlikely and it would make you extremely sick.

Q. If someone told you that they had done that would you find that as a factor you could believe? A. I would doubt that very strongly.

Cross Examination

By Mr. Scott Daniel:

[945] * * * Q. And Dr. White and Dr. Griffin might very well disagree with you on an evaluation and an opinion as to an illness or competency of somebody, might they not? A. Yes, sir. When we got down to talking about the information which we had and things like this, we would be very likely to agree on the grounds that we started from but our final interpretation at least a third of the time would be different, we would disagree with each other.

Q. And that is simply a matter of the fact that as a professional you have to make your own independent judgment based on what you think and based upon your own [946] experience and skill and so forth and not just what somebody else says; is that right? A. Yes, sir.

Q. You did that and you gave the best opinion you could honestly give, didn't you? A. Yes, sir.

Q. And you would presume they would do the same thing, would you not? A. Yes, sir.

Q. And if there is a difference it's just a difference of professional opinion, isn't that correct? A. Yes, sir.

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[949] • • • Q. That is certainly true, isn't it. So what you base your evaluation on is talking with the man himself; isn't that principally what it is? A. Yes, sir, plus watching him and listening to him.

Q. You have to watch and observe and use your own background and skills and knowledge and watching how he reacts to things and observations as to how he handles himself and these type of things; is that what you're saying? A. Yes, sir.

Q. And that is the way psychiatrists, Dr. White and Dr. Griffin or anybody else, would evaluate; is that correct? A. Yes, sir.

Q. Now, when you went through that, as I understood what you were saying, you talked with Mr. Clark one afternoon for you said maybe an hour and a half or something like that? A. Approximately that length of time, yes, sir.

Q. And maybe ten minutes the next day when he came back? [950] A. Yes, sir, we stood actually in the entrance to my office and talked very briefly. I checked one or two things and gave him essentially the report of my evaluation so he would understand what I would say if I were called into court.

Q. And I believe in your evaluation you spent considerable time in advance of talking with Mr. Clark talking with Police Officers Chrisham and Galloway; is that correct? A. Yes, sir, they came in and spent forty-five

minutes to an hour giving us a rather lengthy account of the time from when they—I don't know whether you call it arrested him but from when they stopped Mr. Clark which was like somewhere around midnight until about six-thirty or seven o'clock in the morning. They gave us a lot of details about that time. They gave us some other information about things which had occurred before that, background history, but it was all factual sorts of information that they had gathered in the process of their evaluation.

Q. Or at least it was their view of the information: is that correct? A. (Witness nods in the affirmative.)

Q. In other words the way they see it and the way I or the jury see it might very well be different? [951] A. That is quite true.

Q. So they gave you the information they had or the information that they thought was pertinent to this issue as background information; is that what it was? A. They gave me essentially data so that I could know if Mr. Clark was telling me the same thing that he had told them before. The other thing I had was part of Dr. Griffin's letter to you in which he described his evaluation of Mr. Clark. Part of that letter I don't have, but we had essentially the factual information that was something that I could listen to and compare with what Mr. Clark was telling me.

Q. Why is it important to compare? A. Well, getting back to the question Mr. Dotson raised earlier, if a person consistently says the same thing and if other people say the same thing then it is very likely that is the truth or close to it, particularly if the two people are looking at it from a different standpoint.

Q. Now, was what was said by Mr. Clark and what was said by the police officers as to those particular things consistent? A. Yes, sir, particularly the part from twelve o'clock until—from midnight until six-thirty or seven a.m. their stories were very much the same.

Q. Did you find Mr. Clark to be cooperative [952] with you? A. Yes, sir.

Q. And I believe he answered every question you had and in your opinion didn't appear to be holding back anything, did he? A. No, sir.

Q. And I believe you indicated before that your opinion might differ or would differ one-third of the time, something like that, and this is based upon just a difference in doctors and their views of things, their background, their experience, and whatever is involved; is that correct? A. If I understand your question to be about a third of the time we disagree, yes, sir.

Q. And that doesn't mean that if you disagree one or the other of you is incompetent or not capable as a member of the profession, does it? A. No, sir, it just means that we disagree.

[953] * * * Q. I believe you indicated that the purpose of using these truth serums and hypnosis is to attempt to put a person in a state where he is not aware so that he might tell you something he wouldn't tell you without the administration of the serum; is that correct? A. That is true.

Q. In other words, to try to draw out of him something he might be holding back or that he might be keeping from you? A. That's true.

Q. You can't guarantee that is a hundred percent effective but that is the reason why you use it, to [954] try to do that. A. Yes, sir.

Q. To try to get at the truth, in other words? A. Yes, sir.

Q. I don't believe Mr. Clark was hospitalized by you, was he, other than to take the test? He wasn't admitted to the hospital? A. No, sir, this was done on an outpatient basis.

Q. And I believe you told me on the phone that your reason for saying that you didn't feel that he had amnesia was because you felt like since he related the events, that he was truthfully relating the events to you as he recalled; is that correct? A. He gave me an account of the day and the evening and he stated very specifically that this was where he was and this was what he was doing and that he knew, he said he knew where he was and what he was doing. If I accept that, then there was no time period in which he did not know what he was doing. You know, he says there was no time period in which he did not know what he was doing.

Q. So if another doctor hearing that same thing disagrees with you, that's just a professional difference of opinion, isn't it? Taking the same set of facts and [955] saying that they think that something was repressed or he does not recall or does not remember? A. Well, the problem is that a person with amnesia will say, I don't know what I was doing from this time until that time. He says, this is where I was and this is what I was doing. If you accept that, then you can't say—there is no way to say—that he had amnesia for that period.

Q. I believe if another doctor disagreed with that and felt like even though he relates where he was he had suppressed it and kept this to himself and does not remember it happened, you would disagree with that? Is that what you're saying? A. I'm very sorry, I didn't understand your question.

Q. I take it that you would just disagree with another doctor who believes that a person can in fact relate where they recall having been but suppress memories of specific things during that period? A. I would disagree, yes, sir.

Q. So this is another one of those things in the profession that people disagree about? A. Yes, sir.

Q. And I believe, though, that you told me—and I would like to get this as close as I can so I will have [956] it—"He didn't tell me anything I felt like were lies. He did not withhold anything which would be particularly detrimental. His story was that he had nothing to hide. He seemed to be cooperative, trying to answer everything." A. That was the appearance that he gave me. He didn't give me any reason not to believe him.

Q. I believe I also asked you about whether or not you felt he was telling you the truth and I believe you stated, did you not, "The events as described by the police officers that night and the events as described by him were the same. The events described are the same and that convinces me he is telling me the trtuh. Where I have got something that I know and where I have two accounts and they're the same essentially, that somebody is telling the truth." Is that not what you said? A. Yes, and certainly for that period, from twelve to six-thirty—[Bench conference].

[957] * * * Q. I believe, Doctor, that you told me specifically that you were convinced from what he told you that—"That convinces me he is telling the truth." Those are your exact words, are they not? A. When you're talking about that period from twelve to six-thirty, the answer is yes. And then when you put together the rest of the story, he didn't tell me anything that was inconsistent. And based on that I had no [958] reason not to accept what he was telling me.

Q. All right, what I'm trying to say, Doctor: Did you not tell me in your professional opinion as best you could evaluate it and in your own opinion that you felt that the Defendant was in fact telling the truth?

* * * Q. Isn't that precisely what you told me, that you felt like the Defendant was telling the truth and you saw nothing whatsoever to indicate to the contrary? A. I did not have any reason not to accept what he told me as the truth. I had no way to be sure that it was, but I didn't have any reason not to accept it as the truth either. And if I had reason to accept the rest of the night, based on that I accepted it.

* * *

[962] * * * Q. Let me get back to specifically where we were here. We were talking about the opinions that you gave and the opinions discussed with me. Now, as I understand what you're saying, your opinion is that the Defendant, that is Mr. Clark, when he came for your evaluation and you talked with him you did not find him to be incompetent at the time the acts were committed by whoever committed them, let's put it that way; is that correct? A. Yes, sir.

Q. Now, and I understand from what you're saying that the accused in every way that he could cooperate with you fully and did everything that you asked him to and answered every question you asked him to answer as fully and completely as you requested him to do; is that fair? A. Yes, sir, he cooperated with us and when we asked him a question he gave us the answer.

Q. All right, was there anything that you [963] asked him to do that he in any way refused or failed to cooperate with you? A. The only time there was any problem at all was the evaluation was to start one day earlier than it did, but that was apparently because he was ill, that was the report that we received. He came in and he spent the time there that we needed and he came back the next day and did the tests that we wanted done in order to complete our evaluation.

Q. That's what I mean. In other words, he did everything that you would ask him to do and didn't appear in your opinion to be holding back anything or to be refusing to cooperate in any way? A. That is correct, yes, sir.

Q. And with regard to your opinion as to his condition, I believe you did say that it's that opinion, when you get down to that opinion—that's where the Attorney General asked you were there areas of disagreement in which one psychiatrist and another would have a different opinion based on different backgrounds and techniques and that type thing; is that correct? A. I'm sorry, I don't understand exactly what your question is.

Q. I'm just saying, when it comes right down to it, you just disagree with Dr. Griffin and Dr. White; is [964] that correct? A. Yes, sir.

Q. And conversely they disagreed with you also. And the only background information that you had other than what was elicited from your interview with Mr. Clark was what the police officers gave you; is that correct? A. Yes, sir. That's not very dissimilar from the evaluation which we do and which we solicit information before people come to the Forensic Service Division to get as much information as we can so that we can compare it to what the person tells us after he gets there. If we don't have any information at all we have to work only with what the person tells us. If we can get other information it is helpful.

CLOSING ARGUMENT

By General Henry:

[967] * * * I further have reason to believe that his Honor will instruct you that all killings or all murders are presumed to be malicious unless rebutted.

* * *

[992] * * * Yesterday afternoon two psychiatrists testified for the Defendant as to his mental competency. One of them, Dr. Griffin, stated that regardless of the number of factors Gen. Dotson asked him about he wouldn't change his opinion. He wouldn't change his opinion. That won't make me change my opinion; I could be wrong but I'm not. I won't change my opinion.

Dr. White candidly presented that he could be wrong in his diagnosis if he didn't know all of the factors. They both testified about this medicine that they gave the Defendant to make him tell what had happened in the examination to get to what was going on. And Gen. Dotson asked them both and they testified about what they did when they examined the Defendant to determine his [993] mental competency. He asked them both, "Would the factor that he tried to elude the police change your opinion?" And both of them said, "Well, no, not really," or something like that.

So apparently they didn't know that fact. So the question is how well did those drugs work.

I submit to you that their testimony under close cross-examination did not show the Defendant really suffered from a mental illness so that he did not understand right

from wrong or so that he could not do what was right on the night of December 30th. Dr. White even testified that the inability he was talking about lasted only a couple of hours. That's strange, I submit to you. But you are the weighers of the testimony and the weighers of the facts.

The prosecution presented in rebuttal lay people who knew the Defendant and had known him for some period of time and they didn't notice anything different about him, anything wrong with him.

They presented Terry Hill, Mr. Pittman, Stanley Browning, the brother of the deceased, Eddie Peel, and Lindy Woodson, the owner of the store in the community.

And the State presented Dr. Pieper. I submit to you that Dr. Pieper's testimony showed that the Defendant did not have the mental illness at the time this [994] occurred that would keep him from understanding right from wrong and knowing right from wrong or would allow him as I believe the Court will instruct you, a person is not responsible for ciminal [sic] conduct if at the time of such conduct as a result of mental disease or defect they lack substantial capacity to either appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law.

I submit to you Dr. Pieper showed that the Defendant didn't come within that category.

CLOSING ARGUMENT

By Mr. Scott Daniel:

[996] * * * He said that I had said in the opening that the Defendant was suffering from total amnesia that night. What I said to you was exactly what Dr. White and Dr. Griffin testified to you. And I wrote my opening argument down so I would make sure when I came to this point that I knew what I was saying and I wouldn't have to get up here and off the cuff try to read back and recollect. What I said to you in my opening statement was,

> If as unlikely as it may be the Prosecutor [sic] were able to establish to your satisfaction that Stanley Clark did commit the acts alleged we will show you by psychiatric experts that Stanley Clark has no recollection of participating in any acts such as is charged against him.

That was testified to by three psychiatrists, including the State's own psychiatrist. Now is that the way it was put to you in the proof, the way that the evidence was recited?

* * *

[998] * * * He says that Mr. Smith said the same thing. What did Mr. Smith say to you? He even swore in this witness stand at this time that the children didn't. He didn't change his testimony from before because even before he testified, no, the children just said, "They shot my mommie." "They have guns; they are fighting." And Mr. Smith said that they didn't say anyone. Mr. Smith has never even contended that they said anyone. The Attorney General will say, well, they must have said after they got home or something, but, no, Mrs. Smith said on

the witness stand in regard to a cross-examination question by [999] Mr. Dotson himself for the prosecution, no, she said it while we were in the car, while Mr. Smith was there. And Mr. Smith told you, swore to you that they never said who did it.

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[1038] * * * Well, if that's true—and I don't know that it is—they can't say that it's true in this case. Amnesia is not a defense. If you did something the mere fact that you can't remember it is not a defense, but it certainly explains why you cannot remember, cannot give your explanation of it, because you don't know what it is.

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[1040] * * * This has placed a greater burden on me I guess than anything I have ever run across, to try to defend somebody when you can't even find out, when you can't get inside them. You try everything in the world you know and [1041] you come back to the same point everytime. You try the truth serums, hypnosis, everything there is, and you end up at the same point. I can't tell you what happened; Stanley can't tell you what happened; there's no way we can say to you what happened. But we can say to you one thing: You certainly haven't heard what happened by any competent or any convincing or any satisfying proof in this courtroom.

You heard Dr. White testify that after all he went through that in all of his twenty years he had not seen a case that he would have thought any more was telling the truth than in this one, I think he said one in ten thousand chances or whatever as far as Stanley's re-

action to it, but you have to weigh that and think of what kind of proof. You can't convict somebody because he can't remember what he did just as the fact that he doesn't remember what he did doesn't mean he doesn't do it. I will have to concede that to you. But by the same token, you can't convict him unless he did it. It's just that simple. The simple fact that he has got mental problems —and this Dr. Pieper said, Stanley does have mental problems—he didn't think he was insane at the time as the other two doctors did—but he did say if, based on the history and the background and the facts that they knew —Dr. Pieper didn't bother to ask. The only information he had about Stanley was what he got from the police officers who sat down there from forty-five minutes [1042] to an hour telling them what they wanted him to know. That's the kind of information that the prosecution provided for their doctor.

Now, you heard what Sylvia Leathers [sic] testified to, about how Stanley didn't seem like he knew what he was doing, he was upset, he said one thing one moment then another and then he'd turn around and he'd be talking about something else and he'd say I love her and whip her and although he made a threat to her he said, I can't eat, I can't sleep, I see the Vietnamese coming at me like a herd of sheep and all of these kinds of things.

[1043] * * * But think of a mind that's depressed and has grown up over the years depressed, can't eat, can't sleep, throwing up, crying, this type of thing, and think of the kind of influences that when something happens and gets to you that that can have on a person who is that type of emotionally ill. It is just obvious I think to you and I think it would be to anybody what would happen there.

[1044] * * * Now, where the truth lies and it is I can't honestly tell you, I don't honestly know, but I do know you have not heard the truth from that witness stand. You haven't heard hardly a witness come in here who didn't say something just totally self-serving and contradictory. You haven't heard a witness come in here who could testify about anything material, anything real or truthful that was not at variance with what some other witness said.

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[1046] * * * Now, they will tell you about circumstantial evidence. Circumstantial evidence is those things that we [1047] talked about in jury selection, circumstances from which you can reach an inference. But there's one thing about circumstantial evidence—circumstantial evidence has to lead to only one reasonable conclusion or you cannot accept it.

* * * Now, you can't make me prove that Stanley is innocent. I don't think that I can do that—I don't think there is anyway as long as I can't even find out if he was there. If he was there he has no recollection of it so I can't find the facts.

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[1049] * * * Now, the Judge will instruct you as to reasonable doubt. When you go into the jury room you have to reflect upon this. I submit to you if you have a reasonable doubt about any aspect of this case that is material and that the prosecution has to prove, then it's [1050] your duty to find the Defendant, Stanley Clark, not guilty.

[1051] * * * Finally there is the fifth shot at the scene. She said, "They have guns; they are fighting." They. Somebody is there fighting. There was another shot found at the scene that didn't fit this one because there supposedly were two shells left in the gun. If it was left that way—they said they could have jammed another one in, but it's only reasonable to assume that that's all there was. But there was a fifth shell found there that they didn't send off and the police lost.

[1052] * * * The psychatric [sic] testimony. Of course if didn't [sic] do it you don't have to worry about what his mental state was, but I submit to you that even though I don't believe there is any possible way on this evidence that you could find him guilty, even if you did I submit to you two psychiatrists have come in here who have done every type of tests that can be done to determine and they say that if he did this thing he wasn't competent at the time. Can you beyond a reasonable doubt reject their testimony in favor of Dr. Pieper's testimony? As honest as Dr. Pieper is being with you, can you put this man in prison based upon that? Now, it's the prosecution's burden to prove sanity beyond a reasonable doubt, not my burden to prove something else.

The judge will charge you in a few moments the law that if the Defendant for [sic] the State's evidence raises a reasonable doubt as to the defendant's sanity, such evidence relieves the Defendant of further proof on the issue and shifts the burden of proof to the State. That evidence has [1053] been presented. Can you say to a moral certainty, can you tell me that the State has overcome that burden by their testimony?

REBUTTAL CLOSING ARGUMENT

By General Dotson:

[1056] * * * Back to his defense. His defense, first, is I did not do it. The second defense is, if I did it I was mentally ill and didn't know what I was doing. Let's see how he proved that. He presented Dr. Griffin who said his mental illness was a continuing proposition, he has had this depressive neurosis for a great period of time. And then what did Dr. White say? Dr. White said his mental condition was not a continuing proposition, that he did not have a mental illness before the incident and not after it, just only for a few hours of this alleged incident.

MR. DANIEL: If your Honor please, I have to object to that. That is not what the testimony was. He said he was still ill. He said he was not insane, but he specifically made that distinction.

THE COURT: The jury is sole judge of what the testimony was and the jury will decide that.

GEN. DOTSON: And as I thought I told [1057] you from the outset, the very first day, what I say is not evidence. What Mr. Daniel says is not evidence, it's just our interpretation of that. And I'm going to give you my interpretation, and as the Court says, you can make your decision as to whether my interpretation is right or whether what Mr. Daniel told you about what they said is right.

The second thing, Dr. Griffin said the Defendant knew right from wrong. That's not an indication of a mental illness. But he said he would not have committed the crime if five policemen were present, then admitted that Stanley could conform his conduct to the requirement of law. Do

you not recall him saying that? Don't answer it, but you know and I know.

Under the instructions the Court will give you I believe you will find this: A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, meaning a mental disease or defect in and of itself will not excuse a crime—he lacked substantial capacity either to appreciate the wrongfulness of his conduct—and both of them said he knew right from wrong so that did not apply.

But the second question they raised or the second issue on which they're hanging their hat is "or to conform his conduct to the requirement of law." Now, that's what Mr. Daniel is insisting that Stanley Clark could not [1058] do, could not conform his conduct to the requirement of law. But what was it that Dr. Griffin, his own doctor, said? He could not have committed the crime if five policemen were present. He then admitted that Stanley could conform his conduct to the requirement of law. So you can just pretty well disregard what Dr. Griffin had to say about it. If you're not going to believe him you can disregard it, but if you believe him you've got to disregard what Dr. White said.

And then what did Dr. White say? Dr. White said the Defendant did not know right from wrong. Again, his own two doctors were mistaken, they did not agree upon these facts. Then when told what Dr. Griffin had said, you remember he said that he didn't understand and then he changed his answer. Further, what did he say? He said he would have committed the crime if five policemen were present. He then stated that Stanley could not con-

form his conduct to the requirement of law. One says he could and one says he couldn't.

The third expert witness in this case came in here and told you that under the same set of circumstances one-third of the doctors would disagree. I'm going to show you why I believe you will agree that he was right. Dr. Pieper said that he did not find a mental illness that would prevent Stanley Clark from being able to conform [1059] his conduct to the requirement of law and he stated before that that one-third of the doctors would disagree. So let's see where we stand on his proposition that one-third would disagree. You had one doctor that said he could not conform his conduct to the requirement of law and you had two that said he could, which bears out what he said. Two doctors, the Defendant's own doctor. And if you will recall, the good doctor didn't want to admit it but finally he hung his head and said, yes, he could conform his conduct to the requirement of law, indicating that two out of the three doctors disagrees [sic] with Mr. Daniel's defense of temporary insanity.

Mr. Daniel questioned the other witnesses about what they said on or about February. But do you recall when the Defense of insanity was first interposed? June 4th. The question of insanity wasn't raised until then. As I contend, the Defendant's defenses are clearly inconsistent. He says, one, I didn't do it, but if you prove I did, I'm going to claim that I was crazy or mentally insane and didn't know what I was doing.

* * *

[1061] * * * And again if you will recall Sylvia Hillis, testifying about the threat that Mr. Clark made, gave you

about five or six things that she had noticed that were wrong with the Defendant. Mr. Daniel accused the State of telling Dr. Pieper what the facts were, but do you recall when Dr. Griffin told you the symptoms that he noticed? Right down the line, the very same things that Sylvia Hillis told you. I don't know how she could have heard the same things that an expert psychiatrist could unless she was pretold by someone what the situation was.

Now we get to the heart of this matter: The Defendant does not have a temporary insanity defense. I will give you another illustration as to whether there were differences between the Defendant's own two doctors. Dr. Griffin said medication got Stanley confused, affected his ability to reason about his actions and whereabouts after he told about his trip to Shelbyville and couldn't recount his activities. What did Dr. White say? The same medication produced a realistic and truthful response and helped the Defendant describe where he was. But when Dr. Pieper testified he said the fellow was able to describe everything that he did that night, and when he confronted Stanley Clark with the fact that the other doctors said he had amnesia he [1062] disagreed with it, told Dr. Pieper he knew everywhere he was. But the other two doctors told you Stanley Clark had a reason for not telling the truth and that was that if he did it would open the gates to the penitentiary. I submit to you it's for that reason that he maintained throughout he didn't know where he was and didn't know what he did.

* * *

[1069] * * * Again, as Mr. Daniel requested, decide the case on the facts as they have been presented, not upon collat-

eral matters. Look at all of the witnesses. The Defendant says he was temporarily insane. Who would have known that better than the Defendant's family? He has got brothers. Mr. Daniel had those witnesses subpoenaed. Did any of those tell you he had anything wrong with him? He has a father who has been in the courtroom. Did he tell you anything was wrong with his son? Did anyone that would know these facts that Mr. Daniel said the State's witnesses didn't know—did you have benefit of any of those witnesses? Not one [1070] iota of proof from anybody besides two doctors that didn't agree and they agreed that they were up here because of being paid.

[1071] * * * It's the State's position that this was a willful, deliberate, malicious and premeditated murder. So there will be no misunderstanding, willful just means of purpose, that is that the act which caused the deaths was intended to have that result. Deliberate simply means a cool purpose. Malicious means an evil spirit, and heart bent on mischief regardless of social duty. . . . You are justified in finding willful, deliberate, malicious and premeditated murder. There has been no proof whatsoever to the contrary, that this was not a first degree murder.

TRIAL COURT'S CHARGE

[1075] Members of the jury, the Defendant, Stanley Barham Clark, is charged in count one of the indictment with the crime of murder in the first degree, alleged to have been committed upon the body of one Charles Browning, on the 30th day of December, 1978, in Rutherford County, Tennessee.

The Defendant, Stanley Barham Clark, is charged in count two of the indictment with the crime of murder in the first degree, alleged to have been committed upon the body of one Joy Faulk, on the 30th day of December, 1978, in Rutherford County, Tennessee.

To this indictment the Defendant, Stanley Barham Clark, pleads not guilty to both counts and a plea of not guilty operates in law as a denial of every allegation of guilt contained in the indictment and of every proposition of fact that is necessary to make out the cases of which [1076] which [sic] this Defendant is charged and thus form the issues for your consideration and determination.

The evidence and arguments in these cases have been completed, and it is my duty now to instruct you as to the law. The law applicable to these cases is stated in these instructions, and it is your duty to carefully consider all of them. The order in which these instructions are given is no indication of their relative importance. You should not single out one or more of them to the exclusion of another or others but should consider each one in the light of and in harmony with the others.

• • • The State must prove beyond a reasonable doubt all of the elements of each crime charged, that the crime, if in fact committed, was committed by the Defendant in Rutherford County, Tennessee, and that it was committed before the finding and returning of the indictment in this case.

[1077] • • • Furthermore, each charge of murder in the first degree includes charges of the lesser offenses of murder in the second degree, voluntary manslaughter and involuntary manslaughter. To each of the charges and to

the offenses included thereunder the Defendant has entered a plea of not guilty, thus presenting the issues for your determination.

[1078] You enter upon this investigation with the presumption that the Defendant is not guilty of any of these offenses, and this presumption stands as a witness for him until it is overcome and overturned by competent and credible proof, which satisfies your minds beyond a reasonable doubt of his guilt. It is, therefore, incumbent upon the State, before you can convict the Defendant, to establish to your satisfaction, beyond a reasonable doubt, that the crime as defined in these instrudtions [sic] was in fact committed, in Rutherford County, by the Defendant, under such facts and circumstances as would make him guilty of one of the offenses embraced in the indictment.

By reasonable doubt is not meant just any imaginary doubt that may arise in one's mind, but it is that doubt engendered by an investigation of all the proof and which prevents your mind's resting easy upon the certainty of the Defendant's guilt. Absolute, or mathematical, certainty of guilty is not required to convict of any offense, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to make out the case against the Defendant and as to every grade of offense charged or embraced in the indictment.

* * *

[1082] * * * The Defendant has not taken the stand to testify as a witness, but you shall place no significance on this fact. The Defendant is presumed innocent, and the burden is on the State to prove his guilt beyond a reasonable doubt. He is not required to take the stand in his own be-

half, and his choice not to do so cannot be considered for any purpose against him, nor can any inference be drawn from such fact.

[1083] * * * As to each of the two first degree murder charges, you have six possible verdicts, depending upon how you find the facts:

(1) Not guilty,

[1084] (2) Not guilty by reason of insanity,

(3) Guilty of murder in the first degree,

(4) Guilty of murder in the second degree,

(5) Guilty of voluntary manslaughter, or

(6) Guilty of involuntary manslaughter.

You must find two separate verdcits [sic]: One as to the charge of the murder of Charles Browning, and one as to the charge of the murder of Joy Faulk.

I shall now define murder in the first degree, murder in the second degree, voluntary manslaughter, and involuntary manslaughter.

Any person who willfully, deliberately, maliciously, and with premeditation kills another person is guilty of murder in the first degree.

For you to find the Defendant guilty of murder in the first degree, the State must have proven beyond a reasonable doubt:

(1) That the Defendant unlawfully killed the alleged victim.

(2) That the killing was malicious: That is, that the Defendant was of the state of mind to do the alleged wrong-

ful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victims were killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied [1085] presumption.

(3) That the killings were willful: That is, that the Defendant must have intended to take the life of the alleged victim.

(4) That the killing was deliberate: That is, with cool purpose.

(5) That the killing was premeditated. This means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval.

The mental state of the accused at the time he allegedly instigated the act which resulted in the alleged deaths of the deceased must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. Passion does not always reduce the crime below murder in the first degree. Since a person may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a passion or excited [sic] when the design was carried into [1086] effect.

If you find from the proof beyond a reasonable doubt that the Defendant is guilty of murder in the first degree, you will so report and your verdict in that event shall be: "We, the jury, find the Defendant guilty of murder in the first degree." If you so find, then it shall be your duty after a separate sentencing hearing to determine whether the Defendant will be sentenced to death or life imprisonment, but you will not consider punishment for these offenses at this time.

If you find the Defendant is not guilty of murder in the first degree, or if you have a reasonable doubt as to his guilt of these offenses, then in that event you must acquit him of these offenses.

Any person who unlawfully kills another person with malice aforethought, either express or implied, shall be guilty of murder in the second degree.

For you to find the Defendant guilty of this offense, the State must have proven beyond a reasonable doubt that: (1) The defendant unlawfully and willfully killed the alleged victim; and (2) The killing was malicious.

Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exists [1087] in the mind of the slayer. Malice is an intent to do any injury to another, a design formed in the mind of doing mischief to another.

Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is malice not against

the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.

Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice.

If one person, upon a sudden impulse of passion, without adequate provocation, and disconnected with any previously formed design to kill, kills another willfully and maliciously, such killing is unlawful and is murder in the second degree.

All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable [1088] doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.

Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstan-

ces. A deadly weapon is any weapon or instrument which from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury.

Malice cannot be inferred from mere deadly intent. Because the deadly intent may be justifiable under the law, as where one willfully kills another to save his own life or to save himself from great bodily harm and the danger is imminent and immediate, or when the intent to kill is produced by anger, for if it were sudden and upon reasonable provocation the killing might or might not be manslaughter, but it would not be murder.

The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all of the facts and circumstances developed by the evidence to determine whether the State has [1089] proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the alleged killing was done with malice, then the Defendant cannot be guilty of murder in the second degree and you must acquit him of that offense.

Voluntary manslaughter is the unlawful and intentional killing by one or another, without malice, but upon a sudden heat of passion produced by provocation adequate to obscure the reason of an ordinary man. If the intention and the act are the result of impulse and passion, excited upon sudden and adequate provocation, or being greatly excited upon sufficient cause, and the act is induced by a sudden motive of revenge, the idea of malice is negated, and the killing is voluntary manslaughter.

Killing on a sudden heat of passion, without malice, distinguishes voluntary manslaughter from murder in the

second degree. For you to find the Defendant guilty of voluntary manslaughter, the State must have proven beyond a reasonable doubt: (1) That the Defendant unlawfully killed the alleged victim; (2) That the killing was willful: That is the Defendant intended to take the life of the alleged victim; (3) That the Defendant acted in a state of passion sufficient to obscure his reason; and (4) That the passion was produced by reasonable and adequate provocation.

The provocation that the law deems [1090] reasonable and adequate is one of such nature as would, in the mind of an average reasonable man, stir resentment likely to cause violence, obscure the reason, and lead to action from passion rather than judgment.

Manslaughter is the unlawful killing of another without malice, either express or implied, which may be either voluntary upon a sudden heat, or involuntary, but in the commission of some unlawful act.

Involuntary manslaughter is a homicide committed under such circumstances that it plainly appears that neither death nor bodily harm was intended by the party doing the killing, but that death was accidentally caused by some unlawful act, or by some act not strictly unlawful in itself but done in an unlawful manner and without due caution, and that death was the natural and probable result of such act.

Involuntary manslaughter necessarily negates any intent on the part of the accused to kill another, but does not negate an intent to do the unlawful act or the act not strictly unlawful in itself but done in an unlawful manner and without due caution.

Before the Defendant can be convicted of any degree of homicide, the State must have proven beyond a reasonable doubt that the deaths of the deceased, Charles Browning and Joy Faulk, respectively, were brought about as [1091] a result of the criminal agency of the Defendant: That is, that the deaths of the deceased were due to the unlawful acts of the Defendant.

One who unlawfully inflicts a dangerous wound upon another is held for the consequences flowing from such injury, whether the sequence be direct or through the operation of intermediate agencies dependent upon and arising out of the original cause.

To convict the Defendant, it is not necessary that his act or failure to act be the sole cause, nor the most immediate cause of death. It is only necessary that the Defendant unlawfully contributed to the deaths of the deceased.

Death following a wound from which death might ensue, inflicted with intent to kill, is presumed to have been caused by such wound, and the burden of proceeding by offer of proof is upon the Defendant to show that death resulted from some other cause not attributable to the Defendant. However, while the burden of proceeding any shift, the burden of proof never shifts and is always upon the State to prove beyond a reasonable doubt that the deaths of the deceased were brought about by the unlawful acts of the Defendant.

As part of the plea of not guilty, the Defendant relies on the defense of insanity. You are not to [1092] consider this defense unless you have found that the State has proved beyond a reasonable doubt each essential element of the crime charged.

A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

A mental disease or defect is defined as any abnormal condition of the mind which substantially affects mental or emotional processes and impairs behavior controls. Behavior controls refer to the processes and capacity of a person to regulate and control his conduct. The terms mental disease or defect do not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The questions for your consideration are as follows:

1. Was the Defendant suffering from a mental illness at the time of the commission of the crime?

2. Was that illness such as to prevent his knowing the wrongfulness of his act?

3. Was the mental illness such as to render him substantially incapable of conforming his conduct to the requirements of the law he is charged with violating?

[1093] Lay witnesses have testified with respect to their observations of Defendant's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts known to them.

In weighing the testimony of such lay witnesses, you may consider the circumstances of each witness, his opportunity to observe the Defendant and to know the facts

to which he has testified, his willingness and capacity to expound freely as to his observations and knowledge, the basis for his opinion and conclusions, and the nearness or remoteness of his observations of the Defendant in point of time to the commission of the offense charged.

You may also consider whether the witness observed extraordinary or bizarre acts performed by the Defendant, or whether the witness observed the Defendant's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness' observation of the Defendant and the nature and length of time of the witness' contact with the Defendant.

You should bear in mind that an untrained person may not be readily able to detect mental disease or defect and that the failure of a lay witness to observe abnormal [1094] acts by the Defendant may be significant only if the witness had prolonged and intimate contact with the Defendant.

You are not bound by the opinions of either expert or lay witness. You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight as you believe it to be entitled.

In determining the Defendant's mental status at the time of the alleged crime, the jury is entitled to look to evidence of his actions and words before, at, and immediately after the commission of the alleged crime.

The law presumes the Defendant to be sane. Therefore, in the first instance, the State need not introduce any proof of the Defendant's sanity. However, if the evidence adduced either by the Defendant or the State raises a reasonable doubt as to the Defendant's sanity, then the burden if upon the State to establish the Defendant's sanity beyond a reasonable doubt.

If a reasonable doubt has been raised as to the Defendant's sanity, then for him to be legally responsible for his conduct, the State must have proven beyond a reasonable doubt either that he was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity both to conform his conduct to the [1095] requirements of the law and to appreciate the wrongfulness of his conduct.

If the State has not established these things beyond a reasonable doubt, of if you have a reasonable doubt as to whether, at the time of the commission of the crime, the Defendant, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his donduct [sic] or to conform his conduct to the requirements of the law, then you must acquit him.

If you find the Defendant not guilty by reason of insanity, the form of your verdict shall be: "We find the Defendant not guilty by reason of insanity." A verdict of not guilty by reason of insanity shall result in the automatic detention of the Defendant in a mental hospital or treatment center, pending further medical and legal findings.

[1096] * * * You have heard evidence concerning the alleged drunkenness of the Defendant at the time of this

offense. You are instructed that voluntary drunkenness is generally no defense to a criminal charge. If a person voluntarily drinks and becomes intoxicated, and while in that condition commits an act which would be a crime if he were sober, he is fully responsible for his conduct. This is so unless his drunkenness has continued for such a long period of time so as to result in settled insanity by the time of the offense. It is the duty of men to refrain from placing themselves in a condition which poses a danger to others.

However, as an exception to this rule, voluntary drunkenness can be a defense to the crime of murder in the first degree, depending upon the fact whether the drunkenness prevented the deliberation and premeditation [1097] essential to constitute the crime of murder in the first degree.

The voluntary drunkenness of one charged with taking the life of another can be looked to only for the purpose of determining whether such drunkenness has so affected the mind of the person so charged that, at the time, he was incapable of forming in his mind a premeditated and deliberate design to kill. But in legal estimation, a drunken man may be guilty of murder in the first degree as if he were sober, if it shall appear from the facts that the killing was willful, deliberate, malicious, and premeditated.

Therefore, it is your duty to consider the Defendant's drunkenness, if any, in connection with all the other facts and circumstances in proof, in deciding whether the act was done with premeditation and deliberation. If you find that the Defendant's drunkenness was to such an extent that he was incapable, at the time, of forming in

his mind a premeditated and deliberate design to kill, or if you have a reasonable doubt as to this question, then you must find the Defendant not guilty of murder in the first degree.

Regarding the offenses of murder in the second degree or any lesser degree of homicide, voluntary drunkenness is no defense and can form the basis of no legitimate inquiry.

[1098] Evidence may have been introduced indicating that the Defendant was suffering from amnesia at the time of the commission by someone of the crime of which he is presently accused. Amnesia is the inability to remember. The failure of the Defendant to remember the details of the alleged crime or to remember any of the facts leading up to and surrounding the commission of the alleged crime is in itself no defense to this charge.

The opinion of the Sixth Circuit Court of Appeals was reproduced in the Appendix to the Petition for Writ of Certiorari. (Pet. App. A-1 - A-6).

The opinion of the United States District Court was reproduced in the Appendix to the Petition for Writ of Certiorari. (Pet. App. A-7 - A-21).

The opinion of the Tennessee Court of Criminal Appeals was reproduced in the Appendix to the Petition for Writ of Certiorari. (Pet. App. A-23 - A-39).

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No. 84-1974

In The Supreme Court of the United States

October Term, 1985

JIMMY C. ROSE, WARDEN,

Petitioner,

vs.

STANLEY BARHAM CLARK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether *Sandstrom* error in the context of a mandatory rebuttable presumption is subject to harmless error analysis.

2. Whether the respondent's defenses placed in issue the element of malice so as to preclude harmless error analysis.

3. Whether, in any event, the evidence of malice is overwhelming and so dispositive of intent as to render the *Sandstrom* error harmless.

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Kavanaugh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217 (1925) 12

W. LaFave & A. Scott, *Handbook on Criminal Law* (1972) 25

Tennessee Pattern Jury Instructions (1978) 21

R. Traynor, *The Riddle of Harmless Error* (1970) 10, 12

No. 84-1974

In The
Supreme Court of the United States
October Term, 1985

JIMMY C. ROSE, WARDEN,

Petitioner,

vs.

STANLEY BARHAM CLARK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced in the Appendix to the Petition for Writ of Certiorari. (Pet. App. A-1—A-6). The opinion of the district court is unreported and is reproduced in the Appendix to the Petition for Writ of Certiorari. (Pet. App. A-7—A-21). The opinion of the Tennessee Court of Criminal Appeals is unreported and is reproduced in the Ap-

pendix to the Petition for Writ of Certiorari. (Pet. App. A-23—A-39).

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1985. The petitioner's petition for a writ of certiorari was filed on May 30, 1985, and was granted on October 7, 1985.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated Section 39-2401 (1975 Replacement) provided:

> If any person of sound memory and discretion, unlawfully kills any reasonable creature in being, and

[1]The grant of the petition was limited to Question 2.

> under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder.

Tennessee Code Annotated Section 39-2402 (1975 Replacement) provided, in pertinent part:

> An individual commits murder in the first degree if:
>
> (1) He commits a willful, deliberate, malicious and premeditated killing or murder.

Tennessee Code Annotated Section 39-2403 (1975 Replacement) provided:

> All other kinds of murder shall be deemed murder in the second degree.

STATEMENT

The respondent, Stanley Barham Clark, was indicted by the Rutherford County, Tennessee Grand Jury on two (2) counts of first degree murder in the slayings of Joy Faulk and Charles Browning. Following a jury trial, the respondent was convicted of the first degree murder of Faulk; punishment was assessed at life imprisonment. The respondent was also convicted of the second degree murder of Browning; punishment was assessed at ten (10) years imprisonment.

The respondent did not challenge the malice instructions in the trial court. However, on appeal to the Tennessee Court of Criminal Appeals, the respondent challenged these instructions on the ground that they impermissibly shifted the burden of proof on the element of malice. The state appellate court rejected the respondent's

contention and affirmed the jury's verdict. The Supreme Court of Tennessee subsequently denied the respondent's application for permission to appeal.

The respondent thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee, alleging that the malice instructions violated due process of law pursuant to *Sandstrom v. Montana*, 442 U.S. 510 (1979). The district court agreed with the respondent's contention and granted a writ of habeas corpus ordering the state of Tennessee to retry the respondent within ninety (90) days or release him. This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit.

A. The Offenses

On the night of December 30, 1978, Joy Faulk and Charles Browning were shot to death while seated in Browning's truck in a rural area of Rutherford County, Tennessee.[2] Faulk's young daughters, Mitzi and Michelle, were present at the time of the slayings and were found shortly thereafter wandering along a roadway in search of assistance. (J.A. 43). That night and at trial, Mitzi identified the respondent as the individual responsible for committing the homicides. (J.A. 33-35, 37-38, 40).

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[2]Browning was shot once in the head from a distance of six to eight inches; Faulk was shot three times (twice in the head and once in the shoulder) from a distance of less than eighteen inches. (J.A. 23, 25, 28-29, 31-33, 35, 76-79).

The discovery of four .25 caliber shells in the interior of the truck established that the perpetrator held the weapon inside the cab while shooting the victims. (J.A. 19, 20-21, 27-28).

Prior to the shootings, the respondent was observed pursuing Browning's truck some ten miles from the homicide scene. (J.A. 14-15). After the discovery of the bodies, the respondent was apprehended in the vicinity of his home following a high speed chase. (J.A. 10-13). The weapon used to commit the homicides, a Targa Excam .25 caliber automatic pistol, was later discovered along the route taken by the respondent as he fled the police. (J.A. 21-22).

Investigation showed that the respondent had borrowed the murder weapon from Terry Hill some two weeks before the slayings, untruthfully telling Hill that his own gun had been stolen. (J.A. 74-75, 80). Although he was observed in possession of the murder weapon the week of the homicides, the respondent later denied having it in his possession at that time. (J.A. 72-73).

Further investigation revealed that Faulk and the respondent had been involved in a stormy relationship prior to Faulk severing their relationship during the Fall of 1978. (J.A. 48-49). Following their estrangement, the respondent threatened on at least six occasions to kill Faulk if he ever caught her with another man. (J.A. 48, 50-51, 56, 58, 61). Suspecting that Faulk was dating Browning, the respondent endeavored several days before the homicides to gain information regarding the couple's relationship "before [he] got mad and flew off the handle and did what [he] had to do." (J.A. 59).

B. The Trial

The primary issue litigated at trial was the identity of the perpetrator of the offenses. Although the direct

and circumstantial evidence conclusively established that the respondent was the guilty party, the respondent sought to prove that Sam Faulk (Joy Faulk's former husband) or Shirley Browning (Charles Browning's wife) actually committed the crimes.

Given the overwhelming evidence showing his participation in the slayings, the respondent (who did not testify) also attempted to establish that he was temporarily insane at the time of the commission of the offenses; that he was voluntarily intoxicated at the time of the commission of the offenses; and that he suffered from amnesia prior to and following the commission of the offenses.[3]

C. The Jury Instructions

After instructing the jury that it "should not single out one or more of [the instructions] to the exclusion of another or others but should consider each one in light of and in harmony with the others" (J.A. 182), the trial court gave extensive instructions pertaining to the state's burden of proof, the defendants' presumption of innocence, and the definition of reasonable doubt. (J.A. 182-184, 186-187, 190, 193).

The trial court also instructed the jury in reference to the elements of first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter. (J.A. 182-189). In addition to defining the element

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[3]The respondent's jury instruction requests on the mitigating defense of diminished capacity were denied, as such a defense is not cognizable under state law. *See State v. Taylor*, 645 S.W. 2d 759, 762-763 (Tenn. Crim. App. 1982); *State v. Croscup*, 604 S.W 2d 69, 72 (Tenn. Crim. App. 1980).

of malice necessary to sustain a conviction for first degree murder or second degree murder (J.A. 186-188), the trial court gave the following offending instructions (J.A. 187-188):

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances. A deadly weapon is any weapon or instrument which from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury.
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> • • •
>
> The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all of the facts and circumstances developed by the evidence to determine whether the State has proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the alleged killing was done with malice, then the Defendant cannot be guilty of murder in the second degree and you must acquit him of that offense.

The trial court completed its charge by instructing the jury on the matters of insanity (J.A. 190-193), voluntary intoxication (J.A. 193-195), and amnesia (J.A. 195).

D. The Verdict and Subsequent Proceedings

After due deliberation, the jury returned a verdict finding the respondent guilty of the first degree murder of Joy Faulk and assessed punishment at life imprisonment. The jury also returned a verdict finding the respondent guilty of the second degree murder of Charles Browning and assessed punishment at ten (10) years imprisonment.

The respondent challenged the malice instructions at the first instance in the Tennessee Court of Criminal Appeals, which court held the instructions did not violate the rule of *Sandstrom*. (Pet. App. A-37—A-39). The court further held that the respondent could not have been prejudiced by the instructions in view of his defenses of nonparticipation and insanity. (Pet. App. A-39).

The respondent successfully sought relief in the district court upon the court's determination that the malice instructions were unconstitutional under *Sandstrom*. (Pet. App. A-13—A-15). Relying upon its perception of the defenses raised by the respondent, the district court found that the element of malice was a disputed issue at trial and thus refused to find the error harmless beyond a reasonable doubt. (Pet. App. A-16—A-20).[4]

On appeal from the judgment of the district court, the court of appeals agreed with the district court's determination as to the constitutionality of the malice instructions. (Pet. App. A-3—A-4). Finding that the respondent as-

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[4]The district court found that the respondent presented *mens rea* defenses of insanity, "mental-illness and voluntary intoxication," voluntary intoxication, and amnesia. (Pet. App. A-16-A-17, A-20).

serted defenses which established a ' "lack of *mens rea*' " (Pet. App. A-5), the appellate court declined to reverse the lower court's judgment "despite the substantial evidence of petitioner's guilt." (Pet. App. A-6).[5] The court indicated, however, that were it not for its prior precedent it would inquire as to whether the evidence of malice was " 'so dispositive of intent . . . that the jury would have found it unnecessary to rely on the presumption' " in determining whether the erroneous instructions prejudiced the respondent. (Pet. App. A-6).

SUMMARY OF ARGUMENT

A basic principle of modern American law provides that a defendant is not entitled to a reversal of the trial court's judgment unless he can show not only the existence of an error, but also some likelihood that the error was prejudicial to him. It is therefore settled that appellate courts reverse, even in cases of constitutional error, only upon finding a sufficient probability that the result would have been different but for the error.

In view of the Court's disposition of our petition for a writ of certiorari,[6] we do not appear before the Court to relitigate the issue of whether the jury instructions pertaining to the element of malice violate the principles set forth in *Sandstrom* and its progeny. Nevertheless, we

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[5]The court of appeals characterized the respondent's defenses as "mental illness and intoxication" and temporary insanity. (Pet. App. A-5).

[6]The grant of the petition was limited to Question 2.

believe it indisputable that the erroneous instructions could not possibly have affected the jury's finding of the existence of malice in the setting of this particular case.

We therefore submit: (1) that the jury instructions which incorporate a mandatory rebuttable presumption on the element of malice are subject to analysis under the harmless error doctrine; (2) that the existence of malice was not placed in dispute by the defenses raised by the respondent; and (3) that, in any event, the evidence of malice is overwhelming and so dispositive of the respondent's intent that the Court can confidently conclude that the erroneous instructions did not reasonably contribute to the jury's verdict.

ARGUMENT

I. SANDSTROM ERROR IN THE CONTEXT OF A MANDATORY REBUTTABLE PRESUMPTION IS SUBJECT TO HARMLESS ERROR ANALYSIS.

1. Modern American jurisprudence fully embraces the concept of harmless error in both constitutional and non-constitutional frameworks.[7] In *Fahy v. Connecticut*, 375 U.S. 85 (1967), the Court articulated for the first time

[7]Until recent decades, many appellate courts reversed convictions for trivial errors without regard to the doctrine of harmless error. *See* R. Traynor, *The Riddle of Harmless Error* 3-17 (1970) (hereinafter Traynor). Indeed, prior to the Court's decision in *Fahy*, errors of constitutional dimension consistently resulted in automatic reversals. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Bram v. United States*, 168 U.S. 532 (1897).

the rule that constitutional error may be deemed non-prejudicial and set forth the applicable test as "whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." *Id.* at 86-87.

Chapman v. California, 386 U.S. 18 (1967) represents the Court's initial application of this rule of harmless error in a constitutional setting. There, the Court rejected the argument that "all federal constitutional error, regardless of the facts and circumstances, must always be deemed harmful." *Id.* at 21. While recognizing that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" *id.* at 23,[8] the Court affirmed its belief that in the context of a particular case some error may be deemed to have had no effect, or an insubstantial effect, upon the validity of the jury's verdict. The relevant inquiry thus focuses upon whether the reviewing court may confidently determine "beyond a reasonable doubt that the error com-

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[8]Such errors are generally of a fundamental nature and may be viewed as the functional equivalent of the total denial of trial. *See, e.g., Gideon v. Wainwright,* 372 U.S. 335 (1965) (denial of right to counsel); *Tumey v. Ohio, supra* (denial of impartial tribunal).

Other errors mandating automatic reversal are those whose prejudicial impact is inherently indeterminable on review or whose prejudicial nature is established by the very existence of error. *See, e.g., Strickland v. Washington,* 466 U.S. 668 (1984) (denial of effective assistance of counsel); *United States v. MacDonald,* 435 U.S. 850 (1978) (denial of right to speedy trial).

plained of did not contribute to the verdict obtained." *Id.* at 24.[9]

The harmless error doctrine is now so firmly entrenched in our system of criminal justice that "it is the *duty* of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional errors." *United States v. Hastings*, 461 U.S. 499, 509 (1983) (emphasis added). *See also, e.g.*, *Brown v. United States*, 411 U.S. 223, 230-232 (1973); *Harrington v. California*, 395 U.S. 250, 254 (1969).

Indeed, when courts ignore this duty and "fashion rules whose violations mandate automatic reversals, they 'retrea[t] from their responsibility, becoming instead "impregnable citadels of technicality."'" *Hasting*, 461 U.S. at 509, quoting R. Traynor, *The Riddle of Harmless Error* 14 (1970), and Kavanaugh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925).

The affirmative obligation imposed upon the courts to apply the harmless error rule constitutes a recognition that important considerations counsel against the reversal of a conviction where the defendant has not been demon-

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[9]The Court has consistently applied this standard to determine whether errors of constitutional magnitude may be considered harmless in view of the weight of the evidence against the accused. *See, e.g., Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of right to counsel); *Milton v. Wainwright*, 407 U.S. 371, 377 (1972) (admission of confession in violation of right to counsel); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Harrington v. California*, 395 U.S. 250, 254 (1969) (admission of confession in violation of right to confrontation).

strably deprived of his right to a fair and accurate adjudication of guilt or innocence. Such considerations include the need to prevent the duplication of a proceeding which was not adversely affected by the error, *see McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553, 555 (1984); *Hasting*, 461 U.S. at 509, and the desire to promote the public's "[respect] for the law and the administration of justice," *Stone v. Powell*, 428 U.S. 465, 491 (1976), without according the unharmed defendant a windfall.

2. Despite the general applicability of the harmless error doctrine to constitutional violations, the Court has yet to definitively address the issue of whether "an erroneous charge that shifts the burden of persuasion to the defendant on an essential element of an offense," *Francis v. Franklin*, 471 U.S. —, 105 S.Ct. 1965, 1977 (1985), may be deemed non-prejudicial in the setting of a particular case.[10]

We submit that an erroneous mandatory rebuttable presumption on intent should not be classified with error so basic to a fair trial as to require automatic reversal, regardless of the strength of the proof establishing the element of intent and regardless of the factual and legal significance of the defendant's defense. Rather than view-

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[10]The Court has made clear that in terms of analyzing the *constitutionality* of a given instruction, no distinction exists between a conclusive presumption on intent and a mandatory rebuttable presumpton on intent. *See Francis*, 471 U.S. —, 105 S.Ct. at 1972-1973; *Sandstrom*, 442 U.S. at 519, 524. However, this threshold inquiry is not dispositive of the issue of whether a constitutionally defective mandatory rebuttable presumption may be subject to the rule of harmless error. *Francis*, 471 U.S. —, 105 S.Ct. at 1977, citing *Connecticut v. Johnson*, 460 U.S. 73 (1983).

ing the error in isolation, the Court should apply the harmless error doctrine in order to promote the essential purpose of a criminal trial, i.e., the determination of the defendant's guilt or innocence. *See United States v. Nobles*, 422 U.S. 225, 230 (1975).

The Court has previously indicated a willingness to apply the rule of harmless error to defective jury instructions in suggesting that the impact of the error must be evaluated in the context of the case and "not singled out and standing alone, but in relation to all else that happened." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). Indeed, where a particular instruction is found to be wanting, the reviewing court is under a duty to examine the record and determine "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973).

By focusing upon the entire record, this approach to jury instruction error comports with the *Chapman* analysis which is used to determine whether the error is prejudicial. As expressed by Mr. Justice Rehnquist, writing for the Court in *Cupp*, 414 U.S. at 141:

> [A] judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instructions of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.

While a four-Justice plurality of the Court has opined that application of the harmless error doctrine is pre-

cluded in the context of a *conclusive* presumption on intent due to the possibility that the jury may have relied solely upon the presumption and not the evidence in reaching their verdict, *Connecticut v. Johnson*, 460 U.S. 73, 84-87 (1983),[11] this possibility is non-existent where, as here, the jury was instructed to "look to all the facts and circumstances developed by the evidence to determine whether the State has proven beyond a reasonable doubt the existence of malice." (J.A. 188).[12] Thus, as in other settings involving instructional error, the impact of the *Sandstrom*-deficient instructions is determinable upon review of the entire record. *See, e.g., Hamling v. United States*,

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[11]The *Johnson* dissent soundly questioned the wisdom of the plurality's blanket dismissal of the application of the harmless error rule to the instruction under attack, noting that "(i)n every harmless-error case, there is always the possibility that the error affected the jury's verdict." *Johnson*, 460 U.S. at 97 n. 5 (Powell, J., dissenting). The refusal of the dissent to accept the argument that the mere possibility that the jury disregarded the evidence of intent rendered its verdict subject to automatic reversal is consistent with the very nature of harmless error analysis. *See Harrington*, 395 U.S. at 254 (rejecting the argument that "we must reverse if we can imagine a single juror whose mind might have been made up because of [the erroneously admitted] confessions and who otherwise would have remained in doubt and unconvinced").

[12]By its very terms, the subject instructions contrast sharply with the infirm instructions found in *United States v. United States Gypsum Co.*, 438 U.S. 422, 430 (1978) and *Morrissette v. United States*, 342 U.S. 246, 249 (1952), where the element of intent was expressly and unequivocally removed from the jury's consideration, and is clearly distinguishable from the *Johnson* instruction which was viewed by a four-Justice plurality as amounting to a directed verdict on the issue of intent. *Johnson*, 460 U.S. at 84-85.

Although this distinction would not appear to salvage the instructions' constitutionality, it does provide guidance for determining what harm, if any, may have resulted to the respondent under the facts of this case.

418 U.S. 87, 108 (1974); *Cupp*, 414 U.S. at 146-147; *Turner v. United States*, 396 U.S. 398, 421 (1970).

Despite its declination to apply the rule of harmless error to erroneous presumptive intent instructions, *see Francis*, 417 U.S. —, 105 S.Ct. at 1976 n. 8 ("when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside"); *Johnson*, 460 U.S. at 85-86 (where "the jury may have failed to consider the evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict"), the Court's disposition of these cases suggests otherwise.[13] In *Francis*, the Court deferred to the Eleventh Circuit Court of Appeals' determination that the error was not harmless under the facts appearing in the record. *Francis*, 471 U.S. —, 105 S.Ct. at 1977. It went further, however, and independently concluded that "the evidence of intent was far from overwhelming" so as to preclude reversal. *Id.* Similarly, the *Johnson* plurality declined to disturb the state Supreme Court's refusal to evaluate the erroneous jury instruction for harmlessness, preferring to "leave it to the lower courts to determine whether, by raising a particular defense or by his other actions, a defendant himself has

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[13]Significantly, the *Sandstrom* Court did not reject the concept that an unconstitutional jury instruction can constitute harmless error under *Chapman* and its progeny. The Court chose instead to permit the Montana Supreme Court to make such a determination. *Sandstrom*, 442 U.S. at 526-527. On remand, the state court determined that the error was prejudicial. *State v. Sandstrom*, 603 P.2d 244, 245 (Mont. 1979).

taken the issue of intent away from the jury." *Johnson*, 460 U.S. at 87.[14]

Having established that the mandatory rebuttable presumption under consideration here is subject to application of the harmless error doctrine, we submit that the Court should undertake an independent evaluation of the effect of the instructions.[15] While the Court has indicated a tendency to defer to the lower courts in reference to the applicability of harmless error, *see Francis*, 471 U.S. —, 105 S.Ct. at 1977; *Johnson*, 460 U.S. at 87, 102; *Sandstrom*, 442 U.S. at 510, 526-527; *but see Harrington*, 395 U.S. at 254 (the Court's judgment as to whether constitutional error is harmless must be based on its own review of the record), the Court conducted its own evaluation of the proof in *Francis* and stated that its "primary task" in reviewing a lower court's harmless error determination "is to insure that the court undertook a thorough inquiry and made clear the basis of its decision." *Francis*, 471 U.S. —, 105 S.Ct. at 1977 n. 10.

It is submitted that the court of appeals and the district court inaccurately characterized the respondent's

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[14]The four dissenting Justices would have remanded for a harmless error determination by the Connecticut Supreme Court, suggesting that "there may be many cases in which the facts and circumstances so conclusively establish this element [of intent] that the instruction is wholly superfluous." *Johnson*, 460 U.S. at 96 (Powell, J., dissenting).

[15]Former Chief Justice Traynor of the California Supreme Court has stated that the Court's "responsibility to determine whether a right guaranteed by the United States Constitution has been denied necessarily encompasses the responsibility of determining the consequences that flow from the denial of that right, particularly whether reversal is necessary to vindicate the right." Traynor at 40.

defenses as those defenses are cognizable under state evidentiary law.[16] As a result, the lower federal courts' analysis of the applicability of the harmless error doctrine to this particular case are incorrect and further review by this Court is appropriate to insure a thorough and accuate evaluation of the defective instructions in relationship to the setting of the case.

II. THE RESPONDENT'S DEFENSES DID NOT PLACE IN ISSUE THE ELEMENT OF MALICE SO AS TO PRECLUDE HARMLESS ERROR ANALYSIS.

1. Error, even of a constitutional magnitude, does not generally warrant setting aside a conviction absent a demonstrable affect upon the outcome of the trial. *See United States v. Morrison*, 449 U.S. 361, 364-365 (1980). A four-Justice plurality of the Court has identified certain "rare" situations, such as where the defense relies upon alibi, insanity or self defense to establish innocence or non-culpability, in which a *Sandstrom*-poor instruction may permit the reviewing court to conclude that the error was harmless beyond a reasonable doubt. *Johnson*, 460

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[16]The court of appeals found that "among other defenses," the respondent presented defenses of mental illness and intoxication (i.e., diminished capacity) and temporary insanity. (Pet. App. at A-5). The district court characterized the respondent's defenses as non-participation, mental illness and intoxication (i.e., diminished capacity), insanity, voluntary intoxication, and amnesia "insofar as it reflected upon his state-of-mind" at the time of the commission of the crimes. (Pet. App. at A-16-17, A-20).

In contrast to the opinions of the lower federal courts, the Tennessee Court of Criminal Appeals determined that the respondent presented only two viable defenses: non-participation and insanity, both of which would have totally precluded a verdict of guilty if accepted by the jury. (Pet. App. at A-39).

U.S. at 87.[17] This exception to automatic reversal in the context of a conclusive intent instruction exists because the issue of intent is not in dispute at trial, *id.*, and certainly is applicable where there is no rule of automatic reversal in the context of a mandatory rebuttable intent instruction.

2. The jury's assessment of the defenses raised by the respondent, as those defenses are cognizable under state evidentiary law, could not have been affected by the erroneous instructions on malice. The primary thrust of the respondent's defense centered upon establishing his purported non-participation in the commission of the offenses.[18] Thus, "[a]lthough there was no explicit concession of intent and malice," *Davis v. Kemp*, 752 F.2d 1515, 1521 (11th Cir. 1985), cert. denied *Kemp v. Davis*, — U.S. —, 105 S.Ct. 2689 (1985), the intent of the individual responsible for the murders was not a contested issue. The jury's determination as to the existence of malice could therefore not have been affected by the defective instructions. *See, e.g., Davis*, 752 F.2d at 1521; *Conway v. Anderson*, 698 F.2d 282, 285 (6th Cir. 1983), cert. denied 462 U.S. 1121 (1983); *United States v. Winter*, 663 F.2d 1120, 1144-1145 (1st Cir. 1981), cert. denied 460 U.S. 1011

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[17]Finding that the plurality's opinion would "create an automatic reversal rule whenever a *Sandstrom*-type instruction is given," the four dissenting Justices favored application of a traditional harmless error analysis without regard to the nature of the defendant's defense. *Johnson*, 460 U.S. at 90, 97-98 (Powell, J., dissenting).

[18]In presenting this defense, the respondent sought to have the jury accept his theory that Sam Faulk (Joy Faulk's former husband) or Shirley Browning (Charles Browning's wife) committed the murders.

(1983); *McGuinn v. Crist*, 657 F.2d 1107, 1108-1109 (9th Cir. 1981), cert. denied 445 U.S. 990 (1982).

3. The jury's consideration of the respondent's defense of insanity at the time of the commission of the crimes was likewise not adversely affected by the erroneous instructions on malice. In *United States v. Frady*, 456 U.S. 170 (1982), the defendant contended that he was entitled to a reversal of his first degree murder conviction on the basis that the jury instructions improperly relieved the Government of proving the element of malice beyond a reasonable doubt. *Id.* at 169-170. Finding that "the degree of prejudice resulting from instruction error [must] be evaluated in the total context of the events at trial," *id.*, the Court declined to reverse the defendant's conviction where he had failed to establish that the erroneous instructions "worked to his *actual* and substantial disadvantage" so as to infect the "entire trial with error of constitutional dimensions." *Id.* at 170 (emphasis in original).

In reaching this disposition, the *Frady* Court concluded that regardless of what the jury may have believed as to the element of malice, it would not have found malice non-existent so as to reduce the grade of the offense where it had determined that the defendant premeditatively and deliberately killed the victim. *Id.* at 174.[19] Beyond this, however, "the strong uncontradicted evidence of malice in the record, coupled with Frady's utter failure to come

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[19]The Court went so far as to opine that under the facts of the case, "a finding of a premeditated and deliberate intent to kill [would] be [in]consistent as a matter of law with an absence of malice." *Frady*, 456 U.S. at 174 n. 19.

forward with a colorable claim that he acted without malice," *id.* at 172, compelled the Court to confidently state that there was "no substantial likelihood the erroneous malice instructions prejudiced Frady's chances with the jury." *Id.* at 174.

The analysis utilized in *Frady* is particularly applicable to the instant case where the respondent failed to introduce any colorable defense to call into dispute the existence of malice, and where, as we will argue shortly, the proof of mailce was undeniably overwhelming.

In reference to our contention that the respondent's claim of insanity was not adversely affected by the erroneous instructions, it is clear that the jury determined the existence of the element of malice *prior* to considering the validity of the insanity defense.[20] The jury thus evaluated the respondent's claim of insanity without regard to the manner in which malice was defined.

The very nature of the defense of insanity also compels the conclusion that the element of malice was not placed in dispute by the respondent's proof of insanity, as such defense acknowledges the elements of the offenses charged and simply disavows criminal culpability for their commiss . *See Graham v. State*, 547 S.W.2d 531, 543 (Tenn. 1977). The defense of insanity is therefore, by definition, an exculpatory doctrine which is independent of the requirement of *mens rea*.

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[20]Under Tennessee law, the defense of insanity is considered by the jury only if it has first determined that the state has proven beyond a reasonable doubt the elements of the offense charged. *See* Tennessee Pattern Jury Instructions—Criminal 36.06 (1978). The jury in this case was instructed in accordance with this rule (J.A. 190), and it must be presumed that the jury correctly applied it. *See Johnson*, 460 U.S. at 85 n. 14.

The particular insanity defense presented here lends support to our position that the existence of malice was not disputed at trial. The respondent offered proof establishing that as a result of depression, he lacked substantial capacity to conform his conduct to the requirements of law. (J.A. 86-87, 94, 106, 111, 113-114).[21] By asserting an insanity defense grounded upon volitional impairment, as opposed to cognitive impairment (i.e., the inability to appreciate the wrongfulness of his conduct), the respondent did not challenge or rebut the state's theory that he maliciously committed the offenses. With the respondent's alleged inability to control his conduct at the time of the commission of the offenses not negating his ability to cognitively form the mental element of malice, the defective instructions had no effect upon the respondent's attempt to exculpate his conduct through the defense of insanity.

4. The remaining defense theories proffered by the respondent simply did not place the element of malice into issue under state evidentiary law. Although there was evidence that the respondent was intoxicated at the time of the commission of the crimes,[22] voluntary intoxication not resulting in settled insanity may negate only the element of premeditation and does not, as a matter of law, negate the element of malice. *See Harrell v. State*, 593 S.W.2d 664, 670-671 (Tenn. Crim. App. 1979); *Claiborne v.*

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[21]The respondent's proof thus comported with the definition of insanity under state law. *See Graham*, 547 S.W.2d at 543.

[22]The respondent told defense psychiatrist Dr. John Griffin that he had consumed six six-packs of beer and a pint or one-half pint of vodka on the day of the murders. (J.A. 97-98). That the respondent could physically consume this almost lethal amount of alcohol was sharply disputed by state's psychiatrist Dr. Samuel Pieper. (J.A. 160-161).

State, 555 S.W.2d 414, 418 (Tenn. Crim. App. 1977); *Pyburn v. State*, 539 S.W.2d 835, 840 (Tenn. Crim. App. 1976).[23] With the jury having been correctly instructed in accordance with the applicable law, the defective instructions could not have detrimentally affected the jury's consideration of proof of the respondent's voluntary intoxication as such proof related to a finding of malice.[24]

The respondent also presented proof that he was suffering from amnesia at the time of the commission of the

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[23]Under Tennessee law, second degree murder does not constitute a specific intent crime and thus voluntary intoxication does not negate a finding of malice. *State v. McKinney*, 603 S.W.2d 755, 760 (Tenn. Crim. App. 1980).

[24]The jury was instructed, in pertinent part, on the matter of voluntary intoxication (J.A. 193-195):

> You have heard evidence concerning the alleged drunkenness of the Defendant at the time of this offense. You are instructed that voluntary drunkenness is generally no defense to a criminal charge. If a person voluntarily drinks and becomes intoxicated, and while in that condition commits an act which would be a crime if he were sober, he is fully responsible for his conduct. This is so unless his drunkenness has continued for such a long period of time so as to result in settled insanity by the time of the offense. It is the duty of men to refrain from placing themselves in a condition which poses a danger to others.
>
> However, as an exception to this rule, voluntary drunkenness can be a defense to the crime of murder in the first degree, depending upon the fact whether the drunkenness prevented the deliberation and premeditation essential to constitute the crime of murder in the first degree.
>
> • • •
>
> Regarding the offenses of murder in the second degree or any lesser degree of homicide, voluntary drunkenness is no defense and can form the basis of no legitimate inquiry.

offenses.[25] However, as acknowledged by defense counsel during closing argument (J.A. 1038), amnesia alone is no defense to crime under state law, *Harrell*, 593 S.W.2d at 670-671; *Thomas v. State*, 201 Tenn. 645, 301 S.W.2d 358, 361 (1957), and does not constitute proof of the defendant's mental condition at the time of the commission of the offense. *Burton v. State*, 217 Tenn. 62, 394 S.W.2d 873, 878 (1965).[26] Again, with the jury having been correctly instructed with reference to the matter of amnesia, the erroneous instructions had no effect upon its finding of the existence of malice.[27]

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[25]Although the defense psychiatrists apparently believed that the respondent suffered from amnesia (J.A. 87, 115, 122, 137, 139), the state's psychiatrist indicated that a claim of amnesia was inherently inconsistent with the respondent's steadfast denial that he committed the crimes. (J.A. 158). Interestingly, the respondent himself disagreed with his psychiatrists' diagnosis of amnesia by maintaining that he "knew where he was and what he had been doing" at the time the offenses were committed. (J.A. 156, 165).

[26]While amnesia alone does not constitute a defense, it may be considered as it relates to the defendant's proof of insanity. *See Lester v. State*, 212 Tenn. 338, 370 S.W.2d 405, 408-409 (1963); *Sparkman v. State*, 469 S.W.2d 692, 696-697 (Tenn. Crim. App. 1970). Given that the respondent's insanity defense rested upon his alleged inability to control his conduct, the respondent's purported inability to remember the details of the crimes does not undermine our position that he possessed the cognitive ability to form the element of malice.

[27]The trial court charged the jury with respect to amnesia as follows (J.A. 1098):

> Evidence may have been introduced indicating that the Defendant was suffering from amnesia at the time of the commission by someone of the crime of which he is presently accused. Amnesia is the inability to remember. The failure of the Defendant to remember the details of the alleged crime or to remember any of the facts leading up to and surrounding the commission of the alleged crime is in itself no defense to this charge.

The final defense sought to be developed by the respondent, diminished capacity, is simply not a cognizable defense under Tennessee law. *See State v. Taylor*, 645 S.W.2d 759, 762-763 (Tenn. Crim. App. 1982); *State v. Croscup*, 604 S.W.2d 69, 72 (Tenn. Crim. App. 1980).[28] The respondent's purported *mens rea* defense of "mental illness and intoxication" (Pet. App. A-5; *see also* Pet. App. A-16) was therefore no defense at all and could not have negated the jury's determination of malice as a matter of law.

III. IN ANY EVENT, THE EVIDENCE OF MALICE IS OVERWHELMING AND SO DISPOSITIVE OF INTENT AS TO RENDER THE SANDSTROM ERROR HARMLESS.

1. In determining whether error af a constitutional magnitude requires reversal of a defendant's conviction, the reviewing court must examine the entire trial record to assess the impact of the error on the jury's verdict. *See, e.g., Parker v. Randolph*, 442 U.S. 62, 71, 77, 80 (1979); *Milton v. Wainwright*, 407 U.S. 371, 372-373 (1972);

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[28]By definition, diminished capacity is not an exculpatory defense, but rather constitutes a mitigating doctrine which permits the jury to consider evidence of mental abnormality which, although insufficient to totally relieve the defendant of culpability for his criminal conduct, may lessen the grade of the offense. *See* W. LaFave & A. Scott, *Handbook on Criminal Law* 42 (1972).

The respondent submitted numerous jury instruction requests, three of which incorporated the concept of diminished capacity. (T.R., Technical Record 110, 111-112, 116). These instructions were refused by the trial judge, whose ruling was upheld by the Tennessee Court of Criminal Appeals on the bases that the requested instructions were not accurate statements of the law or were covered in the general charge. (Pet. App. A-36). Since the general charge omits any reference to diminished capacity, it is clear that the court applied state evidentiary law in determining that diminished capacity is not a recognized defense in Tennessee.

Schneble v. Florida, 405 U.S. 427, 431-432 (1972); *Harrington* 395 U.S. at 254.[29] While the "beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *Chapman*, 386 U.S. at 24, this burden is satisfied in the context of *Sandstrom* error by demonstrating that "the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption" in reaching its verdict. *Johnson*, 460 U.S. at 97 n. 5 (Powell, J., dissenting).

We submit that even a cursory reading of the record compels the conclusion that the evidence of malice was overwhelming and so dispositive of the respondent's intent as to constitute harmless error under the facts of the case.[30] In this regard, the proof shows that Joy Faulk and the respondent had been involved in a stormy relationship

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[29]It has also been suggested that it may be appropriate to consider whether the jury would have reached the same result had the error not occurred. *Milton*, 407 U.S. at 377; *Schneble*, 405 U.S. at 432.

[30]Under Tennessee law, malice is an intent to do injury to another or a design formed in the mind to do mischief to another. Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is not malice against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit, and a heart fatally bent on mischief regardless of social duty. *Fox v. State*, 1 Tenn. Crim. App. 308, 441 S.W.2d 491, 495-496 (1968). Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed, but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. *State v. Johnson*, 541 S.W.2d 417, 418-419 (Tenn. 1976).

prior to Faulk terminating their relationship several months before the murders occurred on December 30, 1978. (J.A. 48-49). Following Faulk's termination of their relationship, the respondent threatened on six different occasions to kill her if he ever caught her with another man. (J.A. 48, 50-51, 56, 58, 61).

Suspecting that Faulk was dating other men, particularly Charles Browning, the respondent spoke with Browning's wife on December 24 and visited her on December 25 and December 26 for the purpose of determining the nature of the Faulk-Browning relationship. (J.A. 57-59). When Mrs. Browning refused to give him any information, the respondent made it clear that he was going to act upon his prior death threats by twice stating that he "just wanted to find out what is going on before [he] got mad and flew off the handle and did what [he] had to do." (J.A. 59).

At the time the respondent made this veiled threat, he was in possession of the murder weapon, a .25 caliber automatic pistol. (J.A. 60-61). The respondent had purposefully and deceptively borrowed the weapon from Terry Hill approximately two weeks before the murders (J.A. 74-75), telling Hill that his own gun had been stolen. (J.A. 80). With the proof showing that this was a bogus story inasmuch as the respondent's gun had actually not been stolen,[31] it is clear that the respondent obtained the murder weapon for the sole purpose of committing murder.

Having armed himself with the automatic pistol, the respondent chose the cold and rainy night of December 30

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[31]Under the pretense of his own gun having been stolen, the respondent obtained the murder weapon one week before Christmas. (J.A. 74-75). He subsequently and inconsistently maintained that his gun had been stolen on December 26. (J.A. 62-63).

to accomplish his stated desire to kill Faulk. Shortly after 9:00 p.m. that night, the respondent's truck was observed pursuing Browning's truck (in which Faulk, her six-year-old daughter and her three-year-old daughter were passengers) in a rural area of Rutherford County. (J.A. 14-15). Some ten miles from where this observation was made, Browning pulled into a driveway to permit the respondent to pass him on the roadway. (J.A. 16, 34).[32]

The respondent parked his truck behind Browning's truck, thereby positioning the victims between his truck and another vehicle. (J.A. 18, 34). In order to successfully perform his deadly task, the respondent left on the lights to his vehicle and approached the victims as they sat captive in the cab of Browning's truck. (J.A. 34-36). With the victims offering no resistance, the respondent placed his pistol inside the cab of the truck and began shooting. (J.A. 19, 27-28). Browning was shot once in the head from a distance of six to eight inches and Faulk was shot three times (twice in the head and once in the shoulder) from a distance of less than eighteen inches. (J.A. 23, 25, 28-29, 31-33, 35, 76-79).

After the respondent fled the scene of this carnage, Faulk's young daughters (who were miraculously not injured) crawled over the bodies and were found wandering along the roadway seeking assistance. (J.A. 34, 43). Shortly thereafter the respondent forced a high speed chase, during the course of which he discarded the murder weapon, and was apprehended by the police. (J.A. 10-13, 21-22).

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[32]Given that Browning pulled into the driveway of Faulk's former brother-in-law, it is entirely probable that he did so for the purpose of summoning help.

Under the particular facts of this case, the evidence of malice is overwhelming and so dispositive of intent that the Court can confidently conclude that there was no reasonable possibility that the erroneous instructions contributed to the jury's verdict. Since the error could not have prejudicially impacted upon the verdit, it was harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circiut should be reversed.

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No. 84-1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JIMMY C. ROSE, WARDEN,

Petitioner,

v.

STANLEY BARHAM CLARK,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In a murder trial can jury instructions, which told the jury it was to presume malice and intent to kill from the fact of the killing alone and shifted to the accused the burden of rebutting the presumed malice and intent, be deemed harmless beyond a reasonable doubt where the accused did not concede that a malicious killing had occurred, relied upon the presumption of innocence and presented a mens rea defense?

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SUMMARY OF RESPONDENT'S ARGUMENT

1. Respondent was charged with first degree murder. By his defense he sought to require the State to prove every element of the offense beyond a reasonable doubt. He *contested the issue of malice* and intent and *did not admit* that a malicious killing had occurred and did nothing to lesson the prejudicial effect of the unconstitutional errors contained in the Court's erroneous jury instructions. Those *instructions told the jury that from proof of an unlawful killing and/or use of a deadly weapon the law presumes that the defendant was of a state of mind to do the unlawful act without legal excuse or justification* and that the accused had malicious intent. The Court defined malicious intent as (1) the intent to do injury to another, (2) a design formed in the mind of doing mischief to another, (3) that he actually contemplated the injury or wrong he inflicts, (4) that the condition of his mind indicates a wicked, depraved and malignant spirit fatally bent on mischief, and (5) that it was a consciously unlawful act done intentionally. *These instructions unconstitutionally relieved the State of its burden of proving malice and intent which were necessary elements of the offense charged. Mullaney* v. *Wilbur*, 421 U.S. 684, 93 S.Ct. 1881, 44 L.Ed.2d (1975); *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In Re Winship*, 397 U.W. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Connecticut* v. *Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983); and *Francis* v. *Franklin*, ___ U.S. ___, 105 S.Ct. 1965 (1985).

These instructions likewise unconstitutionally *shifted the burden* to the respondent *to rebut* the presumption of malice and intent *by showing* self-defense, *provocation* or mitigation in violation of the holding in *Mullaney* and *Sandstrom*.

2. The erroneous and unconstitutional instructions on presumed malicious intent totally negated his mens rea defense that he lacked malice and likewise negated his insanity defense. The erroneous instructions further denied respondent the constitutional right to defend soley upon reliance on the *presumption of innocence* and the *State's burden of proof* and were the *equivalent of a directed verdict* on the issue of malice as well as

an *impermissible comment on the weight of the evidence. Connecticut* v. *Johnson; Shockley* v. *State*, 695 SW 2d 754.

3. Where, as here, the issues resulting from the unconstitutional jury instructions related to a contested element of the offense charged, such error could never be considered harmless regardless of how strong the evidence was deemed to be; and since the erroneous instructions do involve a contested element of the offense, there is *no issue* before this Court as to whether or not a *Sandstrom* error can ever be harmless under hypothetical facts or circumstances not present in this case. Moreover, the *Federal Courts* below *did, in fact, evaluate* the error based upon the Sixth Circuit's harmless error doctrine under *Chapman* v. *California*, 386 U.S. 18 (1967) and determined that the error in this case could not be deemed harmless. Furthermore, the evidence of guilty intent is *not overwhelming* but to the contrary the evidence was contradictory and there is no credible evidence as to how the deaths came about, or who provoked the dispute. The evidence, in fact, indicated that the incident may have arisen out of a dispute, fight or mutual combat resulting from an explosion of passion or anger rather than malice and/or due to respondent's intoxification and mental illness.

4. The *Federal Courts* below did not misinterpret or misapply Tennessee law. Issues as to respondent's *insanity, amnesia* and *intoxication*, were raised by the proof and *were relevant* to the jury's considerations even under the established Tennessee law. Furthermore, the prior Tennessee decisions upon which the petitioner relies were based upon the doctrine of presumed malicious intent and the presumption that every person is presumed to intend the usual and natural consequences of his acts, both of which doctrines have now been declared unconstitutional by the Supreme Court's decisions of *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Mullaney Wilbur*, supra; and *Sandstrom* v. *Montana*, supra; so that the *State must actually prove malicious intent* as an element of the crime and any factors bearing upon that mental state would be relevant, including mental illness, amnesia and intoxication. To deny the jury the opportunity to consider such evidence

bearing upon his actual state of mind in order to refute the State's claim of malicious intent would violate Respondent's due process right to present his own version of the facts as well as the prosecution's so that the jury may decide where the truth lies. *Washington* v. *Texas*, 388 U.S. 14; *Chambers* v. *Mississippi*, 410 U.S. 284.

5. The State's attempt to distinguish between volitional impairment and cognitive impairment is contrary to Tennessee law and ignores the established doctrines that a person, who cannot control his conduct due to mental illness, is incapable of forming criminal "intent" because his acts do not proceed from a free will choice or a mind free to act.

6. The *fact that the jury found defendant guilty of first degree murder* which included premeditation, does not mean that the jury would have found malice even without the erroneous presumption. The Tennessee Supreme Court in *State* v. *Martin* which was just decided on December 30, 1985, clearly held that malice is a necessary element of both first and second degree murder and cannot be presumed, and that jury instructions on malice, identical to those in the present case, are unconstitutional and prejudicial. The Court in *Martin* held that the defendant's conviction must be reversed because of this erroneous instruction on malice, even though the Court expressly found that the *proof was sufficient to establish premeditation*, and the evidence of guilt was great.

COUNTER-STATEMENT OF THE CASE

Respondent was charged with two counts of wilful, deliberate malicious and premeditated murder as a result of the shooting deaths of defendant's former girlfriend, Joy Faulk and a man she was with, Charles Browning on January 30, 1978. The jury returned a verdict of murder in the first degree for the death of the woman and murder in the second degree for the death of the male victim.

1. THE EVIDENCE

The state's proof consisted of circumstantial evidence which established that the pistol used in the slayings had been loaned

to the Respondent the week before Christmas 1978, i.e. several days before the deaths occurred (J.A. 74), that Respondent had previously threatened the woman (J.A. 48, 50, 56, 58, 61), and that a police officer had seen Respondent's truck following only five or six feet behind the victims vehicle earlier on the evening of the deaths (J.A. 14, 15). The only eyewitness to testify was Mitzi Faulk, the 6 year old daughter of the female victim. Mitzi stated that the accused had shot her mother though she admitted that the male victim was also carrying a gun. (J.A. 34) On cross-examination, the child gave such contradictory statements that the trial judge ruled she had been impeached as a matter of law (J.A. 39) and he then allowed the testimony of two other witnesses who had picked up the child shortly after the deaths and who testified that the child Mitzi had stated that her mother had been killed and that the Respondent and Browning had guns and were fighting (J.A. 39-43). The child, after acknowledging that she had been told what to say in Court by her father (Tr. 219, 220, 233, 234), stated that defendant's truck had been behind them for an hour (i.e. supposedly the same one that the police officer said had been following only five feet behind), nevertheless, she said nobody in her vehicle even said anything about the truck (Tr. 224, 225). She stated that she could tell the color of the truck because it was half-way daylight or sunlight (Tr. 225, 226) and then later she changed her story and said that she could see because the moon was shining bright (Tr. 248) even though it was after 9:00 p.m. (J.A. 14) and the investigating police officer said it was a "very dark" rainy night (Tr. 48). The child said that she had seen one of the victims take out a gun and put it back in his pocket (Tr. 226, 227), but she denied the statement testified to by the supposed corroborating witnesses, i.e. "They have guns. They are fighting" stating she had not made such a statement to anybody (Tr. 232). She admitted she had told different people "that different people did it" (Tr. 251) and finally again acknowledged that her daddy had told her the questions that were going to be asked and the answers she should give in Court, saying"

> "Q. He told you to say Clicker shot your mama, is that right or am I wrong?
>
> A. You're right.

Q. Your daddy told you to say that, is that right?

A. Witness nods in the affirmative.

Q. And he told you to say Clicker shot Mr. Browning, is that right? (witness nods in the affirmative)." (Tr. 253-255).

The police found a gun with one spent cartridge in victim Browning's pocket (J.A. 30) and also acknowledged that they had found an additional .25 cal. shell casing at the scene but had lost it and they could not say what gun it had been fired from (J.A. 31).

The Respondent presented the testimony of two psychiatrists who said that defendant had suffered from chronic headaches (J.A. 92) and stated their opinions that, assuming that the accused did shoot the victims, he had buried all knowledge, memories and recollections of the events due to total amnesia and was unable to recall the events (J.A. 87, 119, 139) and that in their opinions if he committed the acts charged he was not legally responsible for his acts because of mental illness which rendered him unable to conform his conduct to the requirements of the law (J.A. 87, 122).

The prosecutor through State witness Sylvia Barrett brought out that Respondent had been drinking heavily (J.A. 63, 64) and when Respondent is drinking he's high tempered and gets upset easily (J.A. 69) and that even when he was not drinking Respondent had seemed nervous for the last year. (J.A. 69). On cross-examination of Ms. Barrett Respondent's counsel further emphasized Respondent's heavy drinking (J.A. 64) and elicited from Ms. Barrett that in the days immediately before the killings occurred, the Respondent had talked strange, seemed depressed, would start crying, one moment he would like to see his girlfriend (i.e. victim Joy Faulk) whipped and in the next moment would say "I love her and wouldn't want to see her hurt" and "I don't want to hurt anybody. I wouldn't want to hurt her." (J.A. 67) Mrs. Barrett further testified that the defendant "acted like he really didn't know what he was doing" (J.A. 67), said he had told her of nightmares about his service in the Vietnam War and seeing people and droves of sheep coming at him (J.A. 67, 68). She stated that

during the past year he had lost 35 pounds and seemed awfully depressed like a different person (J.A. 68-70, Tr. 524). Thereafter during the State's cross-examination of defense psychiatrist Dr. Griffin, the prosecutor brought out the fact that the defendant had told Dr. Griffin he had consummed some thirty-six (36) beers on the day the shooting occurred (J.A. 97, 98).

2. RESPONDENT'S THEORY

Respondent did not take ths stand and nowhere conceded that the deaths were committed in a malicious manner but to the contrary, Respondent submitted proposed jury instructions that would have allowed the jury to consider evidence of his intoxication and mental state to rebut the state's evidence of malice but those instructions were denied by the Court (Tr. 1103, 1104; R. 110, 111, 112, 116).

The Respondent's counsel in opening statement told the jury that Respondent, due to total amnesia, had no recollection of the events and that if the evidence in fact should establish that Respondent committed the acts, then due to his mental condition he could not be found guilty (J.A. 7, 8).

Though Respondent's counsel hypothesized that Sam Faulk or some other person had a motive and opportunity to commit the crime (Tr. 23), in closing argument Respondent's counsel pointed out that he was not there and due to amnesia Respondent could not testify as to what occurred and accordingly, no one really knew what had happened:

> "That can mean only one of two things: Either he did not do it, and therefore has no way to remember something that didn't happen, or (2) he did do it, and he simply does not remember, he can't tell you about it (Tr. 1041). I can't tell you what happened; Stanley can't tell you what happened. But we can say to you one thing: you certainly haven't heard what happened by any competent or any convincing or satisfying proof in this Courtroom" (J.A. 173)

and

> "Now where the truth lies and where it is I can't honestly tell you, I don't honestly know, but I do know you have not

> heard the truth from that witness stand. You haven't heard hardly a witness come in here who didn't say something just totally self-serving and contradictory. You haven't heard a witness come in here who could testify about anything material, anything real or truthful that was not a variance with what some other witness said" (J.A. 175).

The defense further argued that the evidence showed that the State's child eyewitness, Mitzi Faulk, had said immediately after the shooting occurred that "They were fighting, they had guns" (J.A. 172, 176); that the State having found a fifth shell which its investigators thereafter lost, that this indicated there had been a fight and another gun involved in the fight (J.A. 176 and Tr. 1051); and that the evidence depicted the accused's mind to be that of a person who was depressed, unable to sleep, throwing up, crying, and emotionally ill (J.A. 174), and stated "you can't convict somebody because he can't remember what he did . . ." (J.A. 174).

Respondent's counsel further stated in closing argument:

> "Now you can't make me prove that Stanley is innocent. I don't think that I can do that . . . I don't think there is any way, as long as I can't even find out if he was there. If he was there, he has no recollection of it, so I can't find the facts" (J.A. 175)
>
> ". . . I submit to you if you have a reasonable doubt about any aspect of this case that is material and that the prosecution has to prove, then it is your duty to find the defendant not guilty" (J.A. 175).

3. THE JURY INSTRUCTIONS

In its charge to the jury the Trial Court instructed on the issue of murder in the first degree by informing the jury that to convict of that offense the State must have proven that (1) the defendant unlawfully killed the victim, (2) that the killings were malicious, (3) that the killings were willful, (4) that the killings were deliberate, and (5) that the killings were premeditated. (J.A. 184, 185) The definition given of the term malice in the instructions on first degree murder was as follows:

> "(2) That the killing was malicious: that is the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victims were killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption." (J.A. 184, 185)

The Court further instructed the jury that the mental state of the accused must be considered carefully to determine if he was sufficiently free from excitement and passion to be capable of premeditation (J.A. 185).

Thereafter, the Court instructed the jury on the offense of murder in the second degree at which time it stated that malice was a necessary element of that offense and further instructed the jury as follows:

> "All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence or both, regardless of whether the same be offered by the defendant or exists in the evidence of the State.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances. A deadly weapon is any weapon or instrument which from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury." (J.A. 187, 188).

In its charge on murder in the second degree, the Court specifically defined malice as follows:

> "Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exists in the mind of the slayer. Malice is an intent to do an injury to another, a design formed in the mind of doing mischief to another.
>
> Express malice is actual malice against the Party slain and exists where a person actually contemplates the injury or

wrong he inflicts. Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignent spirit, and a heart regardless of social duty and fatally bent on mischief.

Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice." (J.A. 186, 187).

4. POST-TRIAL PROCEEDINGS

Respondent appealed his conviction and assigned the improper malice instructions as error alleging violation pursuant to *Sandstrom* v. *Montana*, 442 U.S. 510, (1979) but the Tennessee Court of Criminal Appeals ruled that the instructions were not erroneous and affirmed the conviction (A-37) and defendant's request for permission to appeal to the Tennessee Supreme Court was denied (A-40). Respondent then filed a petition for habeas corpus and the United States District Court granted the writ and ordered a new trial, agreeing with Respondent's contention that the instruction on malice violated due process under *Sandstrom* (A-21). The State then appealed to the United States Sixth Circuit Court of Appeals but that Court affirmed the decision of the District Court (A-6). The Supreme Court then granted the State's Petition for Writ of Certiorari limited solely to the issue of whether the erroneous instructions on malice were harmless beyond a reasonable doubt.

I.

UNDER THE CIRCUMSTANCES OF THIS CASE THERE IS NO ISSUE THAT WOULD PERMIT A FINDING OF HARMLESS ERROR.

A. An Erroneous Presumption On A Contested Element Of The Offense Charged Can Never Be Harmless Since It Is The Equivalent Of A Directed Verdict On That Element And An Impermissible Comment On The Evidence.

Without conceding that there could ever be some hypothetical situation in which the harmless error doctrine could

apply to an instruction creating a mandatory rebuttable presumption on a necessary element of the crime charged, respondent earnestly insists that no such issue is before this Court because under the facts of the present case the element of the offense at issue, i.e. malice, was a contested issue and had not been conceded. Accordingly, there is no need nor indeed is there any reason to discuss the arguments pro and con as to whether there are conceivable circumstances which might justify a determination that such an instruction was harmless.

As the State, i.e. Petitioner, belatedly acknowledges, in a criminal prosecution the State has the burden of proving every element of the offense beyond a reasonable doubt. Presumptions which relieve the State of that burden deny the defendant due process. *Francis* v. *Franklin*, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Connecticut* v. *Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983); *Patterson* v. *New York*, ____ 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Barnes* v. *United States*, 412 U.S. 537, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); *In Re Winship*, 397 U.S. 385, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Petitioner contends that policy considerations should dictate the result in this case and should deprive the accused of the new trial which was granted by the Federal District and Sixth Circuit Courts. While it is obviously true that society has an interest in avoiding duplication of a proceeding which was not adversely affected by the error, it is just as obvious that to deprive the accused of a fair trial, where an element of the offense was presumed and the burden of proof shifted to the defendant, can hardly promote the public's respect for the law and administration of justice, and to require that the accused receive a new and fair trial protecting these fundamental concepts of due process in no sense constitutes a "windfall."

In *Francis* v. *Franklin*, 105 S.Ct. 1965 (1985), this Court was presented with an issue relating to a jury instruction in which the jury was told to presume the issue of intent. There the Court after reviewing the matter in light of prior holdings

in *Sandstrom* v. *Montana*, 442 U.S. 510, *In Re Winship*, 397 U.S. 358, *Mullaney* v. *Wilbur*, 421 U.S. 684, *Morrissette* v. *U.S.*, 342 U.S. 246, *Patterson* v. *New York*, 432 U.S. 197, *Ulster County* v. *Allen*, 442 U.S. 140, *Cupp* v. *Naughton*, 414 U.S. 141 and various other decisions, reiterated the essence of *Sandstrom*, that due process prohibits the State from using jury instructions that create evidentiary presumptions which have the affect of relieving the State of its burden of persuasion beyond a reasonable doubt as to every essential element of a crime, noting that "it is far worse to convict an innocent man than to let a guilty man go free." The Court further concluded that

> "An irrebuttable or conclusive presumption relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts. A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective but it is no less unconstitutional. *Our cases make clear that such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the due process clause.*" *Franklin*, supra, 105 S.Ct. at 1972. (Emphasis added).

This Court in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983) in the plurality opinion, recognized that an instruction creating a presumption with respect to an unconceded element of the offense cannot be harmless because it amounts to a prohibited directed verdict of guilty, as to the issue of intent. It is invalid because it can either lessen the government's burden of proof or unconstitutionally shift the burden of proof to the accused.

The United States concedes that if a Trial Court directed the jury to return a verdict of guilty, a reversal could not be avoided by showing that the trial was in all other respects fair and the Judge's verdict fully reliable, nevertheless the government

asserts that in the present case the State Trial Judge did not enter a directed verdict because he told the jury it was to choose one of six separate verdicts and that, therefore, the respondent was not deprived of his right to a jury trial. This is simply a non sequitur and defies common understanding. If the jury starts out in its deliberations being told by the Court that the accused is presumed to have had malicious intent, it is only logical and natural that the jury would feel that it was required to find the existence of the element of malice.

Moreover, the case here is much stronger for the defense because the accused did not take the stand and according to his own proof was incapable of presenting evidence regarding what actually occurred at the time of the deaths. Since the accused had no way of presenting rebuttal evidence as to what occurred, the jury, under the charge, had no alternative but to heed the Court's instructions and presume the defendant guilty of having malicious intent. If that circumstance is not the functional equivalent of a directed verdict on the issue of intent, then this Court's prior opinions in *Sandstrom* and *Johnson* are rendered meaningless.[1]

All of the various circumstances pointed to by the United States in its attempts to argue against the directed verdict effect of the instructions simply to do nothing more than raise the same arguments which were presented to and rejected by this Supreme Court in the previous cases in which *Sandstrom* errors were found, and the government's arguments simply ignores the clear language of this Court in *Sandstrom*,

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[1] The Court could not have been any clearer in *Johnson* when it stated,

"And *Sandstrom* makes it clear, we think, that a conclusive presumption on the issue of intent *is a functional equivalent of a directed verdict on that issue*.

In *Sandstrom* the jury was instructed that the law presumes that a person intends the ordinary consequences of his voluntary acts. 442 U.S. at 512, 99 S.Ct. at 2453. We held that instruction unconstitutional because a reasonable juror might have viewed it as creating a conclusive or burden-shifting presumption of innocence and prove beyond a reasonable doubt that the defendant had intended to kill *the jurors might have believed that upon finding certain preliminary facts, they were directed to find against the defendant on the element of intent. Connecticut* v. *Johnson*, supra at 523. (Emphasis added).

Johnson, *Patterson*, and *Franklin*. Furthermore, when the jury is instructed that they shall presume guilt from certain facts alone, if found, *the instruction is inescapably an impermissible comment on the weight of the evidence*. *Shockley* v. *State*, 695 S.W.2d 754, 757 (Tex. App. 1985).

Finally, dispositive of the issue is the Tennessee Supreme Court decision handed down on December 30, 1985, in the case of *State* v. *Martin*, a copy of which is attached as an Appendix to Respondent's brief. There it was affirmatively determined that the very identical instructions given in the present case are erroneous and require the granting of a new trial. The Court in ruling held "that a reasonable juror could have misunderstood the instructions on malice, and that they were not constitutionally sufficient in light of *Sandstrom* and *Francis*." It held that the instructions could not be deemed harmless beyond a reasonable doubt *even though the jury found the accused guilty of a premeditated first degree murder and despite the Court's conclusion that the evidence was sufficient to establish and justify a finding of premediation*. Accordingly, as will be shown hereinafter, the entire rationale of the petitioner's case and its arguments have now been wholly invalidated by the Tennessee Supreme Court itself.

B. The Nature of Respondent's Defenses Did Not Eliminate The Issue Of Malice And Intent And Respondent Was Entitled To Rely Upon The Presumption Of Innocence And The State's Burden Of Proof.

The government states that in the present case unlike *Francis*, the Trial Court's instructions on malice did not completely eliminate any of the respondent's "chosen" defenses. That, too, simply ignores the fact that counsel for the accused did not in any way limit his defenses but rather he specifically told the jury that: (1) if they had any doubt as to *any aspect of the case* that the prosecution had to prove, it had a duty to find him not guilty (J.A. 175); (2) that the jury could not rely upon the credibility of the State's witnesses and thus, could not say how the offense had occurred (J.A. 173, 175); and (3) that even if the accused were present and committed the acts alleged, he was

unable to state what, in fact, happened to cause the shootings to occur (J.A. 173-175). As the District Judge noted,

> "From the outset of the trial, it was clear that the defense was unlikely to concede anything, rather that it intended to put the state to its burden of proving beyond a reasonable doubt every element of the offense as charged, physical as well as mental. (Petition for Writ of Certiorari, A-17). (Emphasis added).

The fact that the defendant suggested that there were other persons who had motive and opportunity to commit such acts, and that the accused was mentally ill and not responsible for his actions, even if he did shoot the victims in no way conceded that the deaths were the result of a malicious criminal act. To the contrary, *defense counsel even went so far as to submit three proposed jury instructions specifically seeking to permit the jury to consider evidence of his mental state bearing upon his ability to harbor or formulate malice or intent*, but these instructions were refused by the Court (Tr. 1104; R. 110, 111, 112, 116).[2] Likewise, defense counsel specifically argued to the

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[2] The specific proposed jury instructions which Respondent submitted but which the Court refused to give relating to his capacity to formulate malice or criminal intent were:

". . . If you find that the defendant has presented evidence which shows that he was suffering from mental disease or defect but that this disease or defect was not sufficient to render him legally insane, still you may consider whether the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired or diminished as a result of mental disease or defect which *so affected his judgment that the defendant lacked* the necessary premeditation or specific intent for a conviction of first degree murder, and *the necessary malice aforethought for a conviction of second degree murder.*" (R. 110).

". . . If you find that the defendant's mental capacity was so diminished that you have a reasonable doubt as to *whether he could be guilty of* that *malice* which is an essential requirement of murder in the second degree, you cannot find him guilty of murder in the second degree." (R. 111).

". . . If you find that the defendant killed while suffering from mental disease or defect so great as to *render him unable to formulate a specific intent to kill or to harbor malice*, but not so great as to render him insane, his killing involuntary manslaughter." (R. 112).

"Should you find the defendant guilty of any degree off murder or manslaughter evidence of a diminished capacity, in assessing the punishment to

jury "*You can't convict somebody because he can't remember what he did*, just as the fact that he doesn't remember what he did doesn't mean he didn't do it" (J.A. 174). He continually sought to show that the deaths were the result of a fight and that the true facts as to what actually happened had not been presented because the accused, if he was present, had amnesia and the child eyewitness was so contradicted that her credibility was impeached and her account of the events could not be believed (J.A. 172-176). To deny this mode of defense would completely negate the principles stated by this Court in *Connecticut* v. *Johnson*, *supra* that,

> "We note that a defendant in a criminal trial is justified, of course, in defending solely in reliance on the presumption of his innocence and the State's burden of proof." *Johnson*, supra.

C. The Evidence Is Not Overwhelming As To The Issue Of Intent; Furthermore, The Weight Of The Evidence Is Irrelevant.

Petitioner says that even without the testimony of the child eyewitness, the evidence clearly establishes that whoever was responsible for the slayings acted with malice. That simply is not so.

The State has approached the issue from the standpoint of resolving every contested fact in its favor, which would be consistent and a proper means of analysis if the issue were simply the sufficiency of the evidence to sustain the verdict, however, it is wholly inappropriate when the review is for the purpose of determining the effect of a constitutional error upon the conviction at issue. The view of the evidence taken by the petitioner simply seeks to disregard any opposing view of the evidence and instead replace it with petitioner's own view that its interpretation is absolutely correct and is the only view

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be imposed on the defendant, *you may consider whether the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired* as a result of mental disease or defect which was insufficient to establish a defense to the crime but which *substantially affected his judgment.*" (R. 116).

which is permissible upon the facts of the record in this case. While it is true that the issue before the Court presupposes that the identity of the accused as the one who fired the shots which killed the victims is established, that finding alone hardly eliminates the jury's inquiry as to the *intent* of the perpetrator, the *manner* in which the deaths occurred and the *credibility* of the State's evidence, as to the elements necessary to a finding of guilt of murder in either the first or second degree.[3]

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[3] Illustrative of the numerous and unjustified factual assertions is the State's position that after the discovery of the bodies defendant was apprehended following a high-speed chase during which he disgarded the murder weapon. However, the evidence, in fact, established only that after the officers observed the accused's vehicle, the accused drove off away from his home and was stopped after he had traveled only three-quarters of a mile during which time the officers themselves had had to turn their vehicle around and pursue him. It was only the officers who drove at a high speed and even they did not go over 50-60 miles an hour; they overtook the accused and he stopped (J.A. 10, 11). There is nothing in such conduct as would indicate that the accused even exceeded the speed limit much less that he was involved in a high-speed chase or any inference of guilt.

Likewise, though the gun was found several weeks later on the side of the road in the area where defendant's car had traveled (Tr. 546-548), the officers did not observe the accused dispose of the gun and did not even know of its existence or whereabouts until several weeks later (Tr. 127). Thus, there is nothing to show that the gun was disposed of during the time that he was being sought by the police officers and, in fact, it could well have been disposed of much earlier that evening and under circumstances which are unknown. This would be consistent with defendant's evidence of his amnesia and the psychiatric testimony that the accused suppressed and blocked from his mind all thought or recollection of the events related to the deaths of the victims. When viewed in that light it would certainly not be evidence of a guilty mind or even a conscious effort to cover up the crime.

The government further states that defendant borrowed the gun used in the killings from a friend and then made up a "bogus" story that his own gun had been stolen. There is simply nothing in the record to compel such a conclusion. The evicence concerning this matter was that before Christmas defendant told a friend, i.e. Mr. Hill, that his own pistol had been stolen and that he needed to borrow a pistol (J.A. 80); and on the night of December 26th when defendant discovered his front door open he told Sylvia Barrett that his own pistol had been stolen (J.A. 63). However, contrary to the inference suggested by the State, Respondent did not go into detail with Ms. Barrett about the theft of his pistol and did not discuss whether or not he had had a pistol stolen before Christmas in a previous break-in (J.A. 71). When viewed

Even in the absence of evidence of intoxication or mental illness, the mere fact that the victims were shot at close range would hardly establish that the killings were the result of malicious intent. In Tennessee the jury always has the prerogative to convict of the lesser offense of manslaughter rather than murder. *Howard* v. *State*, 506 S.W.2d 951 (1973). The Trial Judge himself instructed the jury in accordance with Tennessee law that defendant would only be guilty of manslaughter if the killings resulted from an attempt of the perpetrator to save his own life or prevent bodily harm to himself or when the intent to kill is produced by anger, "for if it were sudden and upon reasonable provocation the killing might or might not be manslaughter, but it would not be murder." (J.A. 188), and the

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from the defendant's posture Ms. Barrett's testimony was consistent with his story that he borrowed Mr. Hill's pistol because his own pistol had been stolen. There is nothing sinister in that circumstance and certainly nothing that would warrant a conclusion that he was premeditating a crime. Such devious attempts would be inconsistent with the alleged open threats and the killing of the victims in plain view of the eyewitness, Mitzi, who knew him well and would certainly be in a position to identify him.

The State also asserts that the defendant himself disagreed with the diagnosis of amnesia because he said he knew where he was that night; however, this was not inconsistent with the diagnosis of amnesia as testified by defense psychiatrist who stated that if, in fact, he committed the acts he had suppressed all *conscious awareness* of it, and they said this was consistent with amnesia (J.A. 118, 119, 122, 137, 139).

Of even more significance, however, is the State's implication that the Court and jury were required to find that the eyewitness' testimony was accurate. While the finding of guilt by the jury obviously indicates that they identified the defendant as the perpetrator of the crime; nevertheless, this could have been based simply upon the fact that the gun used in the killings was traced to him and that the statements of the child shortly after the events which indicated that he was engaged in a fight with the victims (J.A. 39-43); it does not indicate that the jury accredited the child's testimony as to *how* the deaths occurred, or that without the improper presumption they would have concluded that a malicious intent existed. Indeed, were it not for the testimony of two other witnesses concerning statements made by the little girl shortly after the event, it is entirely possible and even probable, that the jury would not have accepted any of her testimony. For, as the Trial Judge himself stated on the record, the child's testimony was so contradicted on cross-examination that the Judge concluded she had been impeached and it was only for this purpose that he allowed the admission of the statements made by the child to the other witnesses (J.A. 39).

accused specifically requested this instruction on the lesser included manslaughter offenses (J.A. 82, 83).

The State's own proof established that the male victim had a loaded gun with one spent cartridge, and it further established that there was an unaccounted for shell at the scene of the crime, and its own witnesses said that the child told them that "Charles and Clicker have guns . . . They are fighting. They have guns." (J.A. 39-43). Thus, those circumstances taken together without the instructed presumption would not be inconsistent or preclude a jury finding that the deaths could have resulted from defendant's own self-defense, anger caused by a sudden provocation brought on by the victims themselves, or mutual combat; and since no one could give an uncontradicted and accurate account of what occured, then the proof simply was not sufficient to prove that the perpetrator had not been provoked into the acts which caused the deaths. Furthermore, under Tennessee law circumstantial evidence is not sufficient to convict unless it excludes every other reasonable hypothesis except that of guilt. *State* v. *Thompson*, 519 S.W.2d 789, 792 (Tenn. 1975); *Webb* v. *State*, 140 Tenn. 205 (1918). And, under the Tennessee Constitution the jury has the right to determine both the law and the facts, a provision which the Tennessee Courts have held to mean that the Court cannot invade the province of the jury. *Dykes* v. *State*, 296 S.W.2d 861 (Tenn. 1956). Petitioner insists that it is inconceivable that a jury could acquit under such circumstances, yet other accuseds have been acquitted in many cases of much stronger evidence and indeed in an early Tennessee case this is clearly illustrated.[4]

Finally, the petitioner alleges that irrespective of all of the other considerations in this case, the evidence is so overwhelm-

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[4] In *Short* v. *State*, 15 Tenn. 510 (1835), a case tried upon a special verdict, the jury specifically found and reported in writing that without any legally justifiable provocation the accused, in response to being called a liar, struck and killed the victims, and the jury reported that "The blow was given upon a sudden quarrel, but there was no other provocation than abusive language . . ." Yet, the jury informed the Court that it was not convinced that malice had been established, and the Court then concluded that the accused was guilty of manslaughter and not murder.

ing and so dispositive of intent as to render the *Sandstrom* error harmless. In response to this contention, Respondent would simply point out that the State's assertions of the facts fail to take into consideration what was *not* proved as well as what was proved. That is, since the child witness was discredited and gave a different story on the stand than she gave to the witnesses after the events, there was thus no credible evidence of what took place and whether there was provocation, justification, self-defense or a fight is simply left to speculation. Likewise, the State ignores the fact that when the accused is said to have made threats toward the victim, he also stated that he loved her and could never do her harm (J.A. 66, 67). In essence, what the case all boils down to is the fact that the State's only eyewitness was contradicted and impeached and that nobody truly knows what happened or why it happened. They can guess and infer, but there is *no credible witness* who can say what actually happened. The accused clearly presented a mens rea defense, presented evidence of his mental incapacity and contested every issue. As stated in *Johnson*,

> "*The fact that the reviewing Court may view the evidence of intent as overwhelming is then simply irrelevant.* To allow a reviewing Court to perform the jury's function of evaluating the evidence of intent when the jury may never have performed that function would give too much weight to society's interest in punishing the guilty and too little weight to the method by which the decisions of guilt are made. . . . It is irrelevant in analyzing a mandatory presumption . . . that there is ample evidence in the record other than the presumption to support the conviction." *Connecticut* v. *Johnson*, supra. (Emphasis added).

D. The Harmless Error Doctrine Which Petitioner Would Have This Court Adopt Would Result In A denial Of Fundamental Rights Of Due Process.

At the outset it must be sincerely stated that the view expressed by the United States in the amicus brief of the Solicitor General is truly frightening, for it is apparent that the government's position is that the *administration* of the justice system is more important than the justice dispensed by that

system. While not attempting to delve into or respond to all of the arguments made by the government, which really have no relevance to the circumstances of this case, nevertheless respondent is compelled to point out that the government while *now* acknowledging that there are indeed some constitutional errors which could never be harmless, nevertheless opposed or failed to stand up for the enforcement of those same rights at the time when they were at issue in this Honorable Supreme Court.

Through the histories of the denial of such fundamental precepts of the law, it is clear that, it was only because of this Honorable Supreme Court's adherence to our constitutional protections that the State courts were and are compelled and indeed forced to grant the rights now acknowledged by the government including the assistance of counsel, freedom from a mob-dominated trial, right to trial by jury, representation of co-defendants with conflicting interests, the right to exculpatory information (i.e. Brady claims), ineffective assistance of counsel, and right to a speedy trial. (Brief of United States, pp. 10-12). Since the State and/or lower federal courts with the support of, or at least without the objection of, the United States actually denied those rights, then it is apparent what those same courts might do if given the opportunity to apply the harmless error doctrine to contested *Sandstrom* errors.

To appreciate the opportunity for abuse of the harmless error doctrine in this context, the Court need look no further than the history of this very case and the arguments made and espoused by the State of Tennessee in the lower courts. It has long been the law of the State of Tennessee that mere proof that a killing had occurred created a presumption that a murder had been committed and placed upon the accused the burden of offering mitigating circumstances sufficient to warrant an acquittal or reduce the offense to manslaughter; See *Coffee* v. *State*, 11 Tenn. 283, 291 (1832). The Tennessee Courts gave little concern to the fundamental principles enunciated in *Sandstrom* and indeed, even after the *Sandstrom* decision was handed down the State of Tennessee continued to deny that the

decision in *Sandstrom* meant what it said and the Tennessee Courts continued to affirm convictions based upon such unconstitutional burden-shifting instructions. Accordingly, when the present case came before the Tennessee Court of Criminal Appeals, it ruled against the defendant and affirmed the conviction stating that the instructions did not violate *Sandstrom* (A 37, 38). The Tennessee Supreme Court then refused even to grant certiorari or hear the appeal and continued to uphold convictions based upon those identical instructions (see *State* v. *Bolin*, 675 S.W.2d 40; 1984).

When the defendant then proceeded into the District Court on habeas corpus, the State again refused even to acknowledge that the instructions were erroneous and persisted in seeking to uphold those instructions. The State of Tennessee in support of its continued refusal to admit the error of this obviously erroneous instruction continued to rely upon decisions of the Tennessee Courts wherein these instructions were approved and even in its petition for certiorari in this Court the State alluded to them as being routine pattern jury instructions for use in criminal cases in the Tennessee Courts. (See Petition for Certiorari, pp. 4, 6).

It is clear, therefore, from the history of this case and the prior decisions of many State and Federal Courts, that such fundamental rights as the burden of proof and the presumption of innocence will be denied based upon erroneous arguments or rationale unless this Honorable Supreme Court firmly adheres to the principle that the rights to a fair trial contained in the due process clause must be enforced and cannot be denied by an unwarranted extension of the harmless error doctrine. This Honorable Supreme Court as the ultimate protector of the Constitution must not allow the lower courts to do exactly what the government in this very case is asking them to do, that is, look to the long history by which such rights have been denied as a justification for continuing their denial. Petitioner's arguments are in reality an attempt to erode the most basic and hallowed rights granted in the Constitution and the American system of justice.

E. The U.S. District Court And The Sixth Circuit Court Of Appeals Have Already Applied The Harmless Error Doctrine To The Facts Of This Case And There Is No Basis For Challenging Their Analysis.

The District Judge and the Sixth Circuit Court of Appeals applied the "traditional" harmless error analysis as enumerated by the Supreme Court in *Chapman* v. *California*, 386 U.S. 18 (1967) to the effect that "Under this analysis, error may be disregarded where the beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict" (A 4, 5). The Court of Appeals in finding for respondent agreed with the District Court's finding:

> "Accordingly, we agree with the trial court in this case that there was a *Sandstrom* violation inherent in the instructions given by the Tennessee trial court, and that in this murder case involving a defense of lack of *mens rea*, the error was not harmless beyond a reasonable doubt, despite the substantial evidence of petitioner's guilt presented to the jury." (Pet., A-6).

As the District Judge stated in his thorough evaluation of the effect of the error:

> "In this Circuit,
>
> *** the prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial. If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of mens rea, a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial. ***" (Emphasis added). (Pet., A-15, 16).

After applying that rule, the Court thoroughly analyzed the record,[5] and concluded,

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[5] The Judge extensively analyzed the record and noted that the defendant (1) raised the issue of *mens rea* in his opening statement at the outset of the trial, (2) brought out evidence on cross-examination of the State's witness showing that the defendant had engaged in strange behavior, was experiencing mental problems and was upset physically and depressed emotionally, (3) noted that the Trial Judge himself recognized after the State had rested its

> "Clearly, this is not a situation where the defendant acknowledged at trial that an intentional, malicious killing had occurred and only claimed non-participation therein. Instead, Mr. Clark's defense accented both the physical and mental elements of the offenses charged. His defense was threefold: (1) that he did not commit the killings and knew nothing about them; (2) that, because of mental-illness and voluntary intoxication, he was not guilty; and (3) that, even if the jury should find the existence of all elements of the crimes, he should be found not guilty by reason of insanity.
>
> From the outset of the trial, it was clear that the defense was unlikely to concede anything, rather that it intended to put the State to its burden of proving beyond a reasonable doubt every element of the offenses charged, physical as well as mental. The reliance on a mens rea defense, in addition to the claim of non-participation, was evident throughout the entire trial." (Emphasis added). (Pet., A-16, 17).

In view of the District Judge's diligent analysis of the harmless error doctrine and his extensive review and application of the facts of this case to that doctrine, and the concurrence of the Sixth Circuit in the conclusion that the error was not harmless, there simply is no basis for petitioner's harmless error argument.

Defendant contested not only the issues of insanity but indeed the issues regarding how and why the crime was committed and specifically suggested that if, in fact, the accused

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case in chief, that "the principal issue here as the Court discerns it after three and one half days of trial, is who killed these people, or if the defendant did what was his state of mind," (4) noted that defense counsel requested that the Judge charge the jury concerning defendant's ability to formulate specific intent to kill or to harbor malice, (5) that defense counsel requested that a jury instruction be given concerning the effect of drunkness on defendant's *mens rea*, (6) noted that the defense called two psychiatrists who testified that defendant's mental illness was such that it rendered him substantially incapable of conforming his behavior to the requirements of law, (7) called a psychiatrist who acknowledged that the defendant had informed him that he had consumed six six-packs of beer plus a quantity of vodka on the date the killings occured, (8) that each of these doctors supported petitioner's claim that if, in fact, he committed the offense he had no recollection of the offense of that day due to amnesia. (Pet., A-17, 18, 19).

did shoot the victims it was as a result of a fight. He brought out to the jury that the child witness to the events had stated "They have guns; and they are fighting," (Tr. 306, 315, 316, 998, 1051; J.A. 172-176) and that a fifth shell was found at the scene by the police which would indicate that another shot was fired by someone other than the defendant (Tr. 1051) and one of the victims was found to have a pistol in his pocket (Tr. 155). Defendant's counsel in his closing argument to the jury asserted that the defendant was not required to prove he was innocent and due to his amnesia could not tell what happened even if he had been at the scene and that "I submit to you if you have a reasonable doubt about *any aspect of this case* that is material and that the prosecution has to prove, then it is your duty to find the defendant not guilty." (Tr. 1049, 1050; J.A. 175).

Furthermore, the *State actually sought to shift the burden to the defendant*. The District Attorney took full advantage of the improper burden-shifting presumption by stating in his closing rebuttal argument, that the Court would instruct the jury that all killings are presumed to be malicious unless rebutted (J.A. 170) and,

> "You are justified in finding willful, deliberate, malicious and premeditated murder. *There has been no proof whatsoever to the contrary*, that this was not a first degree murder" (Tr. 1071; J.A. 181).

The Federal Courts below have correctly ruled on this issue.

II.

RESPONDENT WAS PREJUDICED BY THE INSTRUCTIONS ON PRESUMED MALICE GIVEN IN THIS CASE.

A. Respondent Did Not Admit That A Malicious Killing Had Occurred.

Contrary to the assertions of Petiioner, and as pointed out above, Respondent not only contested the elements of the offense but asserted that no one knew what happened; introduced or relied upon evidence of a fight and of his mental state specifically to rebut the inference of malice, premeditation and intent; offered three proposed jury instructions for the specific purpose of contesting the evidence as to this mental state on

the issue of malice, (Tr. 1104; R. 110, 111, 112, 116) and specifically requested the Court to charge the jury as to both of the lesser offenses of voluntary and involuntary manslaughter, neither of which involve malicious intent (J.A. 774). This position in no way, shape or form conceded that the killings if committed by the defendant were done with malice, intent or premeditation.

B. There Is No Logical Basis For Petitioner's Assertion That A Malicious Crime Had To Be Committed Simply Because The Accused Says He Does Not Know What Happened.

Petitioner says that the mere raising of an insanity defense means that the accused acknowledges that the crime was committed in the manner charged. This simply does not make sense. Defendant merely said that if, in fact, he did commit the acts charged, he was mentally ill and did not have the mental capacity to be held accountable. That contention surely does not concede that if he killed the victims he did so with malicious intent. Indeed, the only basis for this proposition cited by the State is its contention that, under the holding of the Tennessee Supreme Court in *Graham* v. *State*, 547 S.W.2d 531, at p. 543 (Tenn. 1977) the very nature of an insanity defense acknowledges the elements of the offense charged and simply disavows criminal culpability. However, that case says nothing of the sort, and on the page listed in the State's brief, there is absolutely no language which would permit that interpretation. Furthermore, it would be unconstitutional and an obvious denial of due process to say that a person who is insane has to admit that he had criminal intent before he can show his insanity. That contention simply is without foundation.

Petitioner further asserts that in *Connecticut* v. *Johnson*, supra, a four-justice plurality held that where the defense relies upon alibi, insanity or self-defense to establish innocence or non-culpability, that the reviewing Court is permitted to conclude that the error was harmless beyond a reasonable doubt. In fact, the Court in *Johnson* said only that where those types of defenses are raised "a defendant *may in some cases admit* the act alleged by the prosecution was intentional,

thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the Appellate Court to consider the error harmless." 103 S.Ct. at 978 (Emphasis added). In the present case the accused never admitted or conceded anything and thus, this Court cannot apply the harmless error analysis and even if it did so, it could not concluded that the issue in this case was harmless beyond a reasonable doubt without simply destroying the rights of an accused to defend solely and alone upon the presumption of innocence and attacks upon the credibility of the prosecution's evidence.

Without having the means to present direct evidence because of his amnesia and in reliance upon his right to not to testify, there is little more he could have done to controvert the issue of intent, and surely petitioner is not contending that the defendant had a duty to testify and could not rely upon the presumption of innocence to overcome the State's proof.

Furthermore, even if all of the State's proof were conclusive as to the events prior to the day of the alleged killings, that would not establish conclusively that the killings occurred in the *manner* contended by the State. It would support a finding by the jury, but it would not *compel* such a finding.

However, after being told that the accused is presumed to have a malicious intent which the Court defined as ". . . an intent to do injury to another, a *design* formed in the mind . . . where a person *actually contemplates* the injury or wrong he inflicts . . . that *condition of the mind* which indicates a wicked, depraved and malignant spirit . . ." (J.A. 186-187), it is obvious that a reasonable juror could have believed that the jury was required by law to find the existence of the malicious intent, including the *design* formed in the mind *which actually contemplated the injury and wrong he inflicted* and that defendant possessed a wicked, depraved and malignant spirit. A reasonable juror could likewise have believed that the presumption required a finding of even the elements of willfulness and deliberation. The Court itself did not attempt to distinguish in its instructions between the various types of intent, and it is clear that a reasonable juror as a layman could very

likely conclude that the presumed intent was the same as the intent embodied in willfulness and deliberation.

It is just as obvious that the jury, having been instructed to find the existence of such intent based upon the fact of the killing alone, then could have reasonably concluded that such an intentional contemplative act was inconsistent with defendant's contention that due to mental illness he was unable to conform his conduct to the requirements of the law. If he was presumed capable of contemplating, designing and intending the actual wrong inflicted then this would mean that his mind was free to act rationally and that his acts were voluntary, which would not be consistent with his defense that he was incapable of conforming his conduct to the requirements of the law.

Petitioner alleges that because the Court instructed the jury that they must determine whether the defendant was guilty or not guilty prior to determining whether or not he was insane, that this establishes that the jury evaluated the respondent's claim of insanity without regard to the manner in which malice was defined. This, too, is a non sequitur, for just the opposite is true. Since the jury was instructed that it must first find the accused guilty of the offense and was told that the guilty malicious intent was presumed, the jury could reasonably have found the malicious intent based upon the presumption of malice rather than an actual finding of malice. The instructions given by the Court nowhere tell the jury that it is not to consider these presumptions when considering the insanity defense, thus, having already concluded that it was required to presume the malicious intent for one purpose, the jury could assume that it must presume such intent on the issue of insanity as well, thereby completely negating his insanity defense.

Accordingly, the presumption clearly denied defendant a fair consideration of the evidence on either of his defenses that (1) the State had not established how the killings occurred and had not established that they were wilfull, deliberate, premeditated or malicious, and (2) that the accused could not be found guilty because of his insanity.

C. Under Tennessee Rules Of Criminal Procedure Respondent Was Not Required To Object To Erroneous Jury Instructions And His Failure To Do So Did Not Indicate Approval Of Those Instructions.

Finally, the Solicitor General contends that because the accused did not object to the instructions on malice at the trial that this supports the conclusion that the instructions were not perceived as likely to prejudice his defense. Again, this simply is not so. Under the Tennessee Rules of Criminal Procedure, #30-B, dealing with objections to jury instructions, *defendant is not required to object to jury instructions*, and as the rule expressly states: ". . . failure to make objection shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for new trial on appeal."

Furthermore, the reason for the failure to object is obvious. As the District Judge pointed out, the law in Tennessee for generations has been in accordance with the jury instruction given by the Trial Court, and it has been affirmed time and again that such instructions are a correct statement of the Tennessee law, which presumes that all killings are murder and once a killing is shown, it places upon the accused the burden of reducing the offense to manslaughter or establishing a complete defense on some other grounds (A 12). Thus, to have objected would have been futile and would have served no purpose since the Court would merely have held, as did the Court of Criminal Appeals, that the instructions correctly stated the Tennessee law.

III.

THE FEDERAL COURTS BELOW CORRECTLY EVALUATED THE ERRORS BASED UPON TENNESSEE LAW.

A. The Trial Court Properly Applied Existing Tennessee Law.

Although the briefs of Petitioner and the amicus briefs filed on its behalf nowhere even address or attempt to define what malice is under Tennessee law, for some reason not apparent, Petitioner contends that the District Judge did not inquire concerning whether and how the jury was instructed on the

aspects of his defense involving intoxication, amnesia and mental illness. In fact, the Judge discussed each of these matters in light of the Tennessee law on malice (A-17-20).

It is likewise difficult to understand how petitioner could say that the Judge did not understand Tennessee law. The District Judge was a Tennessee lawyer of long experience on the Federal Bench in Tennessee, and he clearly knew and appreciated the Tennessee law and properly applied it to his determination in this case. He pointed out in depth that the real problem is the fact that Tennessee had long adhered to the doctrine that *all homicides are presumed to be malicious, so that if the killing be proved, the law presumes that it was malicious and it was incumbent upon the defendant to show by proof, matters in alleviation or that it was a less offense* (A 12), and he quoted from the Tennessee case of *Coffee* v. *State*, 11 Tenn. 283 (1832) concerning the Tennessee doctrine that, "If A killed B, and that fact alone being established by the State, the malice is presumed, and the onus of exculpation is upon the defendant." Citing Tennessee cases (A 12).

The District Judge likewise pointed out that the law of Tennessee presumes malice from the use of a deadly weapon and stated:

> "These presumptions of malice appear to be an outgrowth of *the now unconstitutional presumption that every person* intends the usual and natural consequences of his or her acts. The Tennessee Supreme Court in *Draper* v. *State*, 63 Tenn. 246 (1875) specifically approved the jury instruction that 'Every man is presumed to be innocent, until his guilt is legally made to appear; but when a homicide is clearly proven, and the slayer ascertained, and nothing more appears, the killing is presumed to be criminal, as every person is presumed to intend the usual and natural consequences of his acts.'" (A 12, 13). (Emphasis added).

The Judge clearly analyzed, appreciated and understood the Tennessee law and just as clearly he recognized that the instructions in this case violated the accused's rights to a fair trial under the *Sandstrom* principles.

B. The District Court Correctly Found That The Mental State Of The Accused Was Relevant To The Issue Of Intent Under Tennessee Law.

The governing principles in this case under established Tennessee law require that the jury in determining malice, intent and premeditation must look to the state of mind of the accused to be determined from all of the circumstances in the case, and it is for the jury alone to determine the weight and effect of the evidence.[6]

In *State* v. *Bullington*, 532 S.W.2d 556 (Tenn. Sup. Ct.; 1976) it was held that in order to constitute murder in the first degree, the cool purpose to take the life of the persons slain must be formed and the deliberate intention conceived in the mind of the accused, in the absence of passion, and that,

> "If the purpose to kill is first formed during the heat of passion, the accused, to be guilty of first degree murder must have committed the act *after the passion has subsided. Passion*, as here used, *means any of the human emotions known as anger, rage, sudden resentment or terror which renders the mind incapable of cool reflection.*" (Emphasis added).

The Court in *Bullington* then went on to state:

> "The *mental state* of the assailant . . . rather than the length of time . . . is the material point . . . the mental process . . . may have been instantaneous, and the question of vital importance is—was the mind, at the moment, so far free of the influence of excitement, or passion as to be capable of reflecting and acting with a sufficient degree of coolness and deliberation of purpose; and was the death of the person assaulted, the object sought to be accomplished—the end determined upon."

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[6] In *Gordon* v. *State*, 478 S.W.2d 911, 916 (Tenn. Ct. Cr. App.), in dealing with the malice issue, the Court stated:

> "Of course it is fundamental that the jurors are the sole and only judges of the evidence and the weight to be given to the swearing of each and every witness in the case. *Credibility* of the witnesses and the weight and value of their testimony, the *inferences* to be drawn from their statements, and all factual issues raised by the testimony in evidence introduced—direct and circumstantial, are matters entrusted exclusively to the jury as the triers of the facts."

In *Bullington* it was likewise stated that "*the nature of the fact to be proven*, i.e., the *mental state of the accused*, is such that ordinarily only *circumstantial evidence* is available. The circumstances of the killing itself may afford the needed proof." The Court there, however, went on to note that evidence of intoxication and the extent of its effect upon the mental state of the accused was relevant since *even voluntary drunkness* of the accused could render him incapable of forming a premeditated and deliberate design to kill.

Finally, in the recent case of *State* v. *Adkins*, 653 S.W.2d 708 (Tenn. Sup. Ct.; 1983), the Court there dealt with a case where there was evidence that the accused had been drinking all day long before he committed the homicide in that case and the Court noted the significance of this evidence not only as to the element of premeditation but also that it must be considered on the element of intent, stating,

> "Even when an intoxicated defendant is capable of forming specific intent, his drunkness may be considered in determining *whether he specifically intended the particular act for which he is on trial.*" (Emphasis added).

Thus, under Tennessee law the accused's mental state or condition is the specific and critical issue to be determined in deciding whether the accused possessed the intent to do the particular act charged and thus would relate to premeditation, deliberation and willfulness as well as the intent required for malice, i.e. a design "where a person actually contemplates the wrong he commits." (J.A. 186, 187). Accordingly, *any factor which would effect his mental state or condition* was proper and indeed critical for the jury's consideration.

In the present case for the State to prove the defendant guilty of first degree murder under the instructions given by the Court it must establish that the killing was *intentional*, premeditated and malicious (J.A. 184-186). *Premeditation* was defined by the Trial Court as "*The intent* to kill must have been formed prior to the act itself" (J.A. 185) whereas *malice*, as noted supra, was defined by the Trial Court as "That the defendant was of the *state of mind* to do the alleged wrongful act without legal justification or excuse" (J.A. 184, 185) and an

intent to do injury, *a design formed in the mind* where a person *actually contemplates the injury or wrong he inflicts* (J.A. 186). The Court properly charged the jury that *voluntary drunkness* of one charged with taking the life of another *can be looked to* for the purpose of determining whether such drunkness had so *affected the mind* of the person charged that, at the time he was incapable of forming in his mind a *premeditated and deliberated design to kill*" (J.A. 194).

Intent is likewise an element of malice and while intoxication does not negate malicious intent as a matter of law, it is a fact and circumstnce of the case that the jury is entitled to consider as a part of the defense evidence that negates express malice and would cast doubt upon any inference of implied malice. Having established malicious intent as an element of the offense, the State could not prevent the defendant from offering evidence to counter the existence of the very mental state which makes up that element. Yet, by its instructions, that is precisely what the Court did.

C. The District Judge Did Not Misapply The Law Regarding Amnesia.

The State contends that the Court misinterpreted Tennessee law concerning Respondent's claim of amnesia and that amnesia is not a defense to the crime under Tennessee law. This assertion simply overlooks or disregards what the Court found and stated. Nowhere did the Sixth Circuit Opinion ever mention the word "amnesia" much less state that it was a "defense." Likewise, the District Judge nowhere stated that amnesia was a defense, but rather he simply pointed out that defendant's claim of amnesia was supported by the doctor's testimony and that it was relevant insofar as it reflected upon his state of mind. (Pet. A-19, 20).

D. The Tennessee Courts Have Long Recognized The Right Of The Jury To Consider Mental Illness Not Amounting To Fixed Insanity On The Issue Of Malice In Determining Whether A Homicide Is Murder Or Only Manslaughter.

The petitioner contends that the mental state of the accused is irrelevant since Tennessee does not recognize the defense of

diminished capacity. It may be true that Tennessee has never specifically adopted the doctrine of diminished capacity as that term is used in some jurisdictions and that evidence of intoxication and mental illness not amounting to fixed insanity are not sufficient *as a matter of law* to reduce murder to homicide or negate malicious intent; yet, it is not true that under traditional Tennessee law the mental state or mental illness of the accused is irrelevant to the considerations of whether or not the accused is guilty of murder or the lesser offense of manslaughter.

The only cases cited by the State in support of its position are the cases of *State* v. *Taylor*, 645 S.W.2d 759 and *State* v. *Croscup*, 604 S.W.2d 69. Neither of those cases were decided by the Tennessee Supreme Court and though they do say that Tennessee does not recognize the defense of diminished capacity they were decided upon jury instructions which were not set forth in the Opinion and which the courts said were not accurate statements of the law and that there was no error in rejecting them. Even if the Tennessee Supreme Court would even now agree that the defense of "diminished capacity" as such, does not exist in this State that does not in any way affect the right of the jury to consider all of the evidence, including intoxication, amnesia and mental illness in its determination of whether the accused harbored the necessary malice to constitute the crime of murder. In *Dry* v. *State*, 184 S.W.2d 10 (1944), the Tennessee Supreme Court actually reversed a conviction for murder in the first degree and granted a new trial based upon proof of the mental condition of the accused which, though not sufficient to constitute an absolute defense of insanity, nevertheless was deemed sufficient to affect his mind causing him to lose control due to passion from continued outrage and suppressed anger. That Court specifically noted that if the excitement and passion adequately aroused obscures the reason of the defendant, the killing will be reduced to manslaughter and held,

> "That his actions in procuring the weapon and seeking contact with his wife appeared deliberate and determined, is *not persuasive that his passion had cooled. Suppressed anger is a common accompanyment of passion, the deepest and most powerful emotion, and of determination*

> *beyond control to carry through a design formed in passion.* Nor is the fact that he was relatively calm after the event inconsistent. Having discharged the weapon, his mind recoiled into calm, quite naturally over the strain, he rolled a cigarette but then his outraged love surged again wishing that his hand had been stayed by the intervening peace warrant and he broke down and cried." *Dry* v. *State*, supra.

Likewise, in *Kohler* v. *State*, 152 Tenn. 1 (Tenn. Sup. Ct. 1923) even though the defendant's mental illness was not sufficient to constitute an absolute defense, nevertheless upon a review of the evidence the Court reduced a conviction for murder to manslaughter, because it found that the defendant was under great mental stress,[7] holding,

> "It is not necessary to reduce a killing to manslaughter that passion should be so great as to render the defendant incapable of deliberation or premeditation. If the circumstances be such as are calculated to produce such excitement and passion as would obscure the reason or an ordinary man and induce him, under such excitement and passion, to strike the blow that causes the death of the deceased, this will reduce the killing to manslaughter." *Kohler* v. *State*, supra.

And in the case of *Davis* v. *State*, 161 Tenn. 23 (1930) the Tennessee Supreme Court noted that under the M'Naughten test of an insanity defense under the law as it existed in Tennessee at that time, in order to excuse a party for the commission of a crime, insanity must be of such a character as to deprive the person of his reason so far as to render him incapable of distinguishing between right or wrong or discerning good from evil. The Court nevertheless ruled that if the accused was acting under an insane delusion under the influ-

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[7] In reaching this conclusion, the Court in *Kohler* specifically quoted from the Mississippi case of *Haley* v. *State*, 123 Miss. 87, 85 So. 129, to wit:

> "A husband was being tried for the murder of his wife's paramour, and the evidence for the defendant showed that the accused was so aroused by the wife's confession of adultery that he neither ate nor slept, was in a constant state of agitation for two days. When under great feelings he shot the deceased to protect his vows. It was held that this offense was not greater than voluntary manslaughter." *Kohler* v. *State*, supra.

ence of passion and agitation, he would only be guilty of manslaughter.[8]

The Court in *Davis* further noted that the mental condition would be material on the issue of "cooling time" such that where a normal person would be expected to cool off from a provocation or upset,

> "Possessed by this insane delusion, *deranged* on the subject, he remained deaf to the voice of reason and to the voice of conscience. He was beyond reason and conscience in this particular as the record clearlly shows." *Davis* v. *State*, supra.

It is clear then that the Tennessee Courts have traditionally considered the mental state or illness of the accused on the issue of malice, and the jury was certainly entitled to consider this condition in deciding whether or not the accused in the present case actually harbored the malice necessary to convict of either first or second degree murder.

E. Prior Decisions Of The Tennessee Courts Based Upon Presumed Malice And Intent Are Unconstitutional And Thus Are No Longer Controlling.

(1)

While it is true as Petitioner asserts that the Tennessee Courts have in the past adhered to the doctrine that intoxication would not be a defense to murder in the second degree and would not reduce a homicide below murder in the second

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[8] The Court set aside a conviction of murder and granted a new trial stating,

> "It is not necessary that a defendant's reason be dethrowned to mitigate a killing to manslaughter. It is error to so instruct the jury. *Young* v. *State*, 30 Tenn. (11 Hump) 200; *Haile* v. *State*, 31 Tenn. (1 Swan) 248. If the excitement and passion adequately aroused obscures the reason of the defendant, the killing will be reduced to manslaughter. *Seals* v. *State*, 62 Tenn. (3 Baxt.), 459; *Toler* v. *State*, supra. *A defendant acting under such temporary mental stress is presumed to be incapable of malice an essential element of murder.* How then can malice be imputed to a defendant when his reason is not merely obscured but has been swept away and kept away by an insane delusion under which he acts. How can such defendant be guilty of murder while his delusion persists." *Davis* v. *State*, supra. (Emphasis added).

degree, it is immportant that the reason for this rule be analyzed.

The Tennessee Supreme Court in *State* v. *Bullington*, supra, which was decided in 1976 and has been often cited since that time, set forth and repeated the rules regarding evidence of intoxication, and specifically cited as the basis for that decision the case of *Hale* v. *State*, 30 Tenn. 154 (1850); likewise, in a subsequent Tennessee case concerning that issue the Tennessee Court of Criminal Appeals in *Burns* v. *State*, 591 S.W.2d 780 (1979) cited the Tennessee Supreme Court case of *Atkins* v. *State*, 119 Tenn. 458 (1907) as its authority. From those cases it is clear that those long held Tennessee doctrines relied upon by Petitioner have been directly overturned by the decisions of the United States Supreme Court which held that the presumptions underlying those decisions are unconstitutional.

The Court in *Atkins* v. *State*, supra, simply reiterated the prior holding in *Hale* v. *State*, supra, where the Court stated as follows:

> ". . . The principle layed down by the court is, that when the question is can drunkness be taken into consideration in determining whether a party be guilty of murder in the second degree, the answer must be, that it cannot; *but when the question is, what was the actual mental state of the perpetrator at the time the act was done*, was it one of deliberation and premeditation, *then it is competent to show any degree of intoxication* that may exist, *in order that the jury may judge, in view of such intoxication, in connection with all other facts* and circumstances, whether the act was premeditatedly and deliberately done.
>
> *The law often implies malice from the manner in which the killing was done*, or the weapon with which the blow was stricken. In such case, it is murder, though the perpetrator was drunk. And no degree of drunkness will excuse in such case unless by means of drunkness an habitual or fixed madness be caused. *The law in such cases, does not seek to ascertain the actual state of the perpetrator's mind, for the fact from which malice is implied having been proved, the law presumes its exis-*

> *tence, and proof in opposition to this presumption, is irrelevant and inadmissible. Hence, a party cannot show that he was so drunk as not to be capable of entertaining a malicious feeling. The conclusion of law is against him.*
>
> But when the question is, whether a party is guilty of murder in the first degree, *it becomes indispensible that the jury should form an opinion as to the actual state of mind with which this act was done.* All murder in the first degree (except that committed by poison and by lying in wait), must be perpetrated willfully, deliberately, maliciously and premeditatedly. *The jury must ascertain as a matter of fact that the accused was in this state of mind, when the act was done.* Now according to cases of *Swan* v. *The State*, and *Pirtle* v. *the State*, *any fact that will shed light upon this subject may be looked to by them, and may constitute legitimate proof for their considerations.* And among other facts any state of *drunkness* being proved as a legitimate subject of inquiry, as to what influence such intoxication might have had upon the mind of the offender and the perpetration of the deed.
>
> We know that an intoxicated man will often upon a slight provocation, have his passions excited and rashly perpetrate a criminal act.
>
> Now, it is unphilosophical for us to assume, that such a man would in the given case be chargeable with the same degree of deliberation and premeditation, that we would ascribe to a sober man perpetrating the same act upon a like provication. *Hale*, supra at p. 157; *Atkins*, supra at p. 418. (Emphasis added).

In further discussing the same subject of intoxication, the Tennessee Supreme Court in *Lewis* v. *State*, 304 S.W.2d 322, decided in 1957, went on to further state that the basis for the presumption of malice in a murder case is,

> "Every man is presumed to be innocent until his guilit is legally made to appear; but when a homicide is clearly proven, and the slayer ascertained, and nothing else appears, the killing is presumed to be criminal, as *every person is presumed to intent the usual and natural consequences of his acts.*" (Emphasis added).

Thus, under established Tennessee law evidence of the state of mind as to intent, where intent is at issue, is admissible before

the jury and "any fact that will shed light upon this subject may be looked to by them and may constitute legitimate proof for their consideration." However, under the pre-*Sandstrom* Tennessee law the *intent* which is the very essence of malice *was not at issue* where the killing was proved or a deadly weapon was used *because the law then presumed the malicious intent* from those facts alone. The accused was not allowed to controvert this presumption except to show that he acted in self-defense or that there was provocation which brought about his acts, because it was held "every person is presumed to intend the usual and natural consequences of his act." Since the Supreme Court's decisions in *Mullaney*, *Sandstrom* and *Patterson* and *Francis*, such presumptions are clearly unconstitutional and malicious intent can no longer be presumed but must actually be proved where it is a necessary element of the crime charged. Accordingly, since the basis for the rule that excluded intoxication or other evidence of the state of the accused's mind no longer exists, and since intent is the essence of malice, the accused now would have the right to show under Tennessee law itself, "*any fact*" or evidence that would have a bearing upon his "state of mind" or "actual mental state" as it relates to the malicious intent. Likewise, the Tennessee Courts can no longer presume that the accused intended the usual and natural consequences of his acts to establish implied malice, but actual intent must also be established by the evidence since such intent is a necessary element of the crime of murder. Again, such intent would allow proof of any facts which would shed light upon the subject.

The Tennessee Supreme Court has now apparently recognized this circumstance, since its Opinion in *State* v. *Martin*, supra, now clearly holds that in Tennessee malice is an essential element of both murder in the first degree and murder in the second degree, that it is an element different from premeditation and must be actually proven, since "No element of a criminal offense is to be presumed," and that the issue of malice requires the jury "to draw inferences and to decided questions of credibility."

Thus, evidence of defendant's mental illness, amnesia and consumption of vast quantities of alcohol were proper subjects

or circumstances for consideration by the jury on the issue of defendant's mental state or mens rea. In fact, the State itself raised the issue of the accused's intoxication during the testimony of Sylvia Barrett (J.A. 63, 69), and during cross-examination of the defense's psychiatrist it brought out substantive evidence of intoxication by way of an admission by the defendant in an apparent attempt to prove that defendant's amnesia was a result of intoxication rather than insanity (J.A. 97-98). The State can hardly complain about the relevance of evidence the State itself introduced into the record, and clearly such evidence is relevant and material.

(2)

Under the law of Tennessee as it was held at the time of Respondent's trial, mere proof by the State that a killing had occurred raised a presumption of malice and without more the law presumed that the killings were murder in the second degree. The State than had the burden of showing the circumstances sufficient to raise the offense to first degree murder, while on the other hand the burden was placed upon the accused to establish circumstances of provocation or mitigation sufficient to rebut the implied malice and reduce the offense to manslaughter. See *Everett* v. *State*, 528 S.W.2d 25 (Tenn. Sup. Ct. 1975); *Sikes* v. *State*, 524 S.W.2d 483 (Tenn. 1975); *Lewis* v. *State*, 304 S.W.2d 322 (Tenn. Sup. Ct. 1957); and *Coffee* v. *State*, 11 Tenn. 283, 291 (183). Proof sufficient to rebut the presumed malice and reduce the offense to manslaughter includes evidence that the killing resulted from the heat of passion caused by adequate provocation. *Cooper* v. *State*, 210 Tenn. 63, 356 S.W.2d 405 (Tenn. Sup. Ct. 1961). In this context passion is defined as synonymous with anger and includes any of the emotions of the mind known as *anger, rage, sudden resentment, or terror. Winton* v. *State*, 151 Tenn. 177 (1924). Likewise, "Homicide resulting from *mutual combat* or the excitement and heat of passion arising therefrom is voluntary manslaughter." *Wright* v. *State*, 497 S.W.2d 588 (Tenn. 1973); *Bryant* v. *State*, 503 S.W.2d 955, 958 (Tenn. 1973). Furthermore, "To rebut this presumption, the defendant need only prove that he was greatly provoked . . . it seems to be a pure

question of fact for the consideration of the jury who are to decide whether the act was intentional, and if so, by what motive the agent was really actuated." *Coffee* v. *State*, 11 Tenn. 283 (1832).

The instructions given by the Trial Judge in the present case were in accordance with the above-stated doctrines of long established Tennessee law, so that once the killing was established, it was incumbent upon the respondent to bear the burden of satisfying the jury that the malice was rebutted and that the deaths had resulted from mutual combat or passion, anger or rage resulting from adequate provocation. This clearly was unconstitutional under the Supreme Court's holdings in *Mullaney*, *Patterson*, *Sandstrom* and *Francis*, supra. As specifically held in *Mullaney* and *Patterson*, the attempt by a State to place the burden upon the accused to disprove an element of the crime is unconstitutional and a denial of due process. It is thus obvious that the jury instructions in the present case violated Respondent's rights by requiring him to produce evidence which would reduce the offense from murder to manslaughter. Much of the evidence suggests that the deaths may have come about as a result of "mutual combat," passion, anger, rage or sudden resentment. Without the erroneous presumption placing the burden on the accused, the jury might well have concluded that there was sufficient indication that something other than a malicious killing had occurred. The jury well could have found that the State had failed to meet its burden of proving the actual circumstances surrounding the deaths and the accused's actual state of mind, and accordingly, could have found defendant guilty of the lesser offense of manslaughter—if they found him guilty of anything at all.

F. The Petitioner's Attempt To Prohibit The Consideration Of Evidence Bearing Upon Respondent's Actual Mental State Would Be A Denial Of The Due Process Right To Present A Defense.

Finally, it is clear that the State's arguments concerning consideration of intoxication, mental illness and amnesia could not be justified constitutionally. First of all, regardless of any other considerations the evidence was, in fact, presented to the

jury and was properly admitted. Indeed, as previously noted, the State itself introduced evidence of Respondent's drinking in an apparent attempt to rebut his insanity defense by inferring that his amnesia and alleged malicious intent were produced by intoxication rather than any mental illness (J.A. 63, 64, 69, 97, 98). Thus, the State could hardly object to evidence which it introduced and sought to utilize to its own advantage.

Furthermore, since the very charge of malicious killing requires a finding as to Respondent's intent and state of mind, the State could not constitutionally refuse to allow the jury to consider evidence which was properly admitted and clearly relevant to the issues of his actual state of mind; to do so would violate the fundamental principles of due process under the 14th Amendment by denying the Respondent the right to present evidence in his own defense in order to establish his own version of the facts as they relate to his mental state and intent. This is even more significant due to the fact that the State by the improper jury instructions placed the burden upon the Respondent to rebut the implied malice and criminal intent. Having required the accused to bear this unconstitutional burden, the State would now go even further and have this Court hold that the jury would not have been authorized to even consider the properly admitted evidence which would rebut the improper presumption. This simply cannot be justified.

As the Supreme Court in *Faretta* v. *California*, 422 U.S. 806, 818, plainly held, the 14th Amendment due process guarantees includes the accused's Sixth Amendment right to obtain witnesses in his favor, and as the Court there phrased it "In short, the amendment constitutionalizes the right in an adversay criminal trial to make a defense as we know it." the Supreme Court has emphasized the importance of this fundamental right by holding that even legitimate State evidentiary rules must bow to the requirement that an accused be permitted to establish the elements of his defense. In *Chambers* v. *Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297, 308, this Court said that "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against

the State's accusations." Thus, it ruled that reliable hearsay could not be mechanistically excluded where it was vital to the accused's defense. Likewise, in *Green* v. *Georgia*, 42 U.S. 95, 97 the Supreme Court ruled that "regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case exclusion constituted a violation of the due process clause of the 14th Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial." In *Washington* v. *Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, (1967) the Court summed up the issue as follows:

> "The right to offer the testimony of witnesses and to compel their attendance if necessary is in plain terms *the right to present the defendant's version of the facts as well as the prosecution's to the jury* so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witness for the purpose of challenging their testimony, *he has the right to present his own witnesses to establish a defense*. This right is a fundamental element of due process." (Underscoring added).

The First Circuit Court of Appeals in *Pettijohn* v. *Hall*, 599 F.2d 476 (1979) had occasion to analyze the doctrine further and review the various Supreme Court decisions as a result of which it set forth conclusions which are highly relevant and pertinent to the present case, to-wit:

> "In the context of a criminal trial, the sixth amendment severely restricts a trial judge's discretion to reject such relevant evidence. Exclusion of relevant exculpatory evidence infringes upon the *fundamental right* of an accused to *present witnesses in his own defense*. The right of compulsoty process in state courts is well established. . .
>
> . . . *Washington* v. *Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). This right *gains special importance when the evidence is critical to the accused's defense*. *Chambers* v. *Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).
>
> Once a sixth amendment right is implicated, the state must offer a sufficiently compelling purpose to justify the practice. Various state evidentiary rules which advanced legitimate state interests have bowed to the defendant's

> right to let the jury hear relevant evidence. See, e.g., *Washington* v. *Texas*, supra (state interest in avoiding perjured testimony did not justify its rule barring co-conspirators from testifying); *Chambers* v. *Mississippi*, supra (state law excluding third party hearsay confessions did not justify exclusion). Cf. *Davis* v. *Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (confrontation right prevails over juvenile proceedings privilege statute); *United States* v. *Nixon*, 418 U.S. 683, 709, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (executive privilege yields to need for criminal evidence). The reasons offered for exclusion in this case are likewise insufficient. *Pettijohn* at 480. (Emphasis added).

Under the circumstances of this case and after the evidence was in fact admitted, the Petitioner cannot now justly say that the accused was not entitled to have that evidence considered by the jury or the appellate courts on the very issue that was the subject of the unconstitutional jury instruction. The State was allowed to benefit from the unconstitutional presumption of malice and criminal intent and the accused was required to produce evidence in rebuttal. To uphold the State's position would be to simply disregard any precept of fundamental fairness or due process and would be in effect saying that the accused did not have a right even to present a defense to the charges against him.

IV.

THE AUTHORITIES RELIED UPON BY PETITIONER ARE NOT APPLICABLE TO THE FACTS OF THIS CASE AND HAVE BEEN DIRECTLY REFUTED BY THE TENNESSEE SUPREME COURT.

As a further basis for its contention that the error in this case is harmless, petitioner relies upon this Court's prior decision in *U.S.* v. *Frady*, 56 U.S. 170 (1982). However, it is clear that *Frady* is irrelevant to the inquiry here since in *Frady*, contrary to the present case, the *defendant was required to carry the burden of showing prejudice* because of his own procedural default. Thus, the manner in which the Court in *Frady* chose to review the evidence has no bearing upon the issue in the present case. This is further made obvious by the fact that

Franklin was decided three years after the *Frady* decision. Despite this obvious difference as to the burden of proof and the standard of review, the petitoner nevertheless insists that *Frady* is pertinent to the present inquiry because it insists the Court recognized the feasibility of the inquiry concerning whether or not the defendant had been prejudiced by the erroneous instruction. Petitioner's reasoning is clearly flawed, since, as noted, due to the procedural default, *Frady* is founded upon principals not applicable to the present case, i.e. the defendant there had the burden of establishing prejudice. Nevertheless, even if the rationale of *Frady* were to be applied, it would have no bearing upon the outcome of the present case for obvious reasons.

First, the Court in *Frady* expressly emphasized that even under the procedural disadvantage imposed upon the defendant, the result would be different had it not been for *Frady's* utter failure to come forward with a colorable claim that he acted without malice even though the Court noted that *Frady* himself *testified* at the trial. That is a far cry from the present case, where *respondent Clark did not testify* but to the contrary presented medical proof that as a result of amnesia he had no way of relating what, in fact, occurred if, in fact, he was the one who committed the acts charged. Thus, petitioner, unlike *Frady*, had no means of explaining or coming up with an explanation of the events, and since he did not testify he was under no burden to present an account of the events which would raise an issue as to the circumstances. Respondent was entitled to rely solely and alone upon the presumption of innocence and the State's duty to prove each and every element of the offense beyond a reasonable doubt.

Furthermore, even though he could not testify about the deaths, the respondent attempted to show that if, in fact, he killed the victims he had no memory of the events and no means of showing how or why it occurred, and he attacked the credibility of the State's witnesses, showing that (1) the only eyewitness was impeached and contradicted in her testimony, (2) that rather than the deaths occurring simply as a result of an unprovoked and simply shooting, in fact they resulted from

some type of fight, and (3) the victim was in possession of a gun and there simply was no way to say beyond a reasonable doubt who provoked whom or how or why the deaths occurred.

In addition, the Court in *Frady* reasoned that since the jury found the accused guilty of first degree or premeditated murder, that this necessarily included a finding of malice and that the jury must, therefore, have found passion or provocation irrespective of the defective jury charge. In the present case, however, this issue has now been addressed directly by the Tennessee Supreme Court in its December 30, 1985, decision in *State* v. *Martin*, supra. There, as pointed out above, the Tennessee Supreme Court made a clear distinction between the elements of premeditation and malice. Even though the accused in that case was convicted of a deliberate premeditated murder, *the Court in Martin reversed the conviction based upon erroneous jury instructions which are identical to those in the present case*. The Court did so while stating that the jury had before it sufficient evidence to justifiably find premeditation and deliberation. Despite the finding of a deliberate premeditated killing, the Court held that malice was a separate issue and that the instructions, given to the jurty created a rebuttable presumption of malice which violated the U.S. Supreme Court's holdings in *Sandstom* and *Francis*, and the Court concluded that it could not say the error was harmless. Thus, the Tennessee Supreme Court itself has refuted petitioner's theory and has affirmatively held that under Tennessee law a conviction of the higher offense of first degree murder which includes premeditation and deliberation does not mitigate a *Sandstom* error involving a presumption of malice.

The Tennessee Supreme Court in *Martin* went on even further to hold that, the instructions as to the definition of malice itself were erroneous. Even though an adequate definition of the term malice was given in the portion of the jury charge relating to second degree murder, the Court concluded that this was not sufficient to cure the error caused by the failure to adequately define malice in the portion of the charge relating to first degree murder. The Court found that the instructions could have caused the jury to find the accused guilty of first

degree murder by looking only to the instructions related to first degree murder without regard to the instructions on second degree murder, and *also could have caused a reasonable juror to believe that the accused has the burden of proof as to the element of malice.* The Court in *Martin* specifically stated,

> *Malice in an essential element of both murder in the first degree and murder in the second degree.* It may be inferred by the trier of fact from the use of a deadly weapon. *Sikes* v. *State*, 524 S.W.2d 483, 485 (Tenn. 1975). In that connection, however, in the jury instructions on murder in the first degree all that the trial judge told the jury concerning the element of malice was that the State must prove beyond a reasonable doubt:
>
> > '(2) that the killing was malicious; that is, *that the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse.* If it is shown beyond a reasonable doubt that the alleged victim was killed, *the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption; . . .*'
>
> In the section of the charge dealing with murder in the first degree, this was the only instruction or explanation given with respect to the element of malice. The term was not further defined. In a separate section on murder in the second degree, full explanations of malice, express and implied were given.
>
> . . . Since the decision of the Supreme Court of the United States in the case of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) the use of the term 'presumption' in jury instructions has been constitutionally suspect, except for the presumption of innocence. The Court reiterated the principles of the *Sandstrom* case in the recent decision of *Francis* v. *Franklin*, 471 U.S. _____, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), emphasizing that *no element of a criminal offense is to be presumed, and* that *jury instructions must not cause a reasonable juror to believe that the accused has the burden of proof as to any element* of the offense on trial.
>
> . . . Nevertheless, we are of the opinion that *the charge on malice contained in the first degree murder instructions, standing alone, was inadequate.* It did not use the term

> 'inference,' but instead used 'presumption.' It did not explain that rebuttal could be established by evidence from the State or from the accused. *It contained an inadequate explanation of the term 'malice.'*
>
> . . . We are of the opinion that a reasonable juror could have misunderstood the instructions on malice, and that they were not constitutionally sufficient in light of *Sandstrom* and *Francis*, supra.
>
> . . . Because of the closeness of the issues and *because the proof of necessity required the jury to draw inferences and to decide questions of credibility, we cannot say that the error in this case was harmless beyond a reasonable doubt.* Accordingly, we are constrained to reverse the judgment of the trial court and to remand this cause for a new trial. (Emphasis added).

In footnotes to its Opinion, the Court in *Martin* further emphasized:

> [2]In the first degree murder cases as well as those in the second degree, *malice may be either express or implied, but the instructions given here make no such explanation. See Turner* v. *State*, 119 Tenn. 663, 108 S.W. 1139 (1907).
>
> [5]Even though some repetition or cross-references may be involved, *in our opinion the court's instructions as to each offense defined for the jurors to consider should be complete within themselves.* In Tennessee the jury instructions in felony cases must be reduced to writing and, after being read orally, delivered to the jurors for use in their deliberations. Rule 30(c) T.R.C.P. In the present case the only definition of 'malice,' express or implied, was contained in the instructions on murder in the second degree. (Emphasis added).

Each of the errors found by the Court in *Martin* apply equally to an identical instruction on malice given in respondent's case, including the fact that the presumption of malice stated in the isolated section of the portion of the charge related to first degree murder could have been misunderstood by a reasonable juror as shifting the burden to the accused to rebut the presumption of malice.

In determining that the erroneous instructions were not harmless, the Court in *Martin* specifically looked to the fact

that the credibility of the witnesses and the inferences to be drawn from the proof were jury issues and cannot be disposed of by a presumption and the burden of disproving malice cannot be shifted to the accused. It is true that the Court did also state that the issues were close, nevertheless from a review of the overwhelming evidence presented by the State as outlined by the Court in the *Martin* decision, it is clear that they were close only in the sense that the accused testified in his own behalf to give a different view of his intent, even though, as the Court emphasized, his statement of the facts was wholly and totally inconsistent with and *contradicted by the numerous eyewitnesses* to the offense. In other words, it is only because of the accused's own testimony that any conflict was created in the evidence whereas in the present case because of the defendant's amnesia and mental illness, he was unable to even recall being at the scene and thus, could not present a differing version of the facts. Certainly, the accused could not lawfully be prejudiced by the fact that he has no recollection of the events and that he exercised his right not to testify and depended upon his right to attack the credibility of the State's evidence and to rely upon the presumption of innocence.

V.

RESPONDENT'S EVIDENCE OF INSANITY CLEARLY RAISED AN ISSUE AS TO HIS ABILITY TO FORM THE INTENT NECESSARY TO COMMIT THE CRIME.

Inexplicably the State argues that the evidence of the issue of intent has no relation to respondent's defense of insanity because the State says his defense was volitional rather than cognitive. This attempt to distinguish between volition and cognition in this context is wholly erroneous. Defendant's doctors testified that in their opinion he was suffering from mental illness which made him unable to conform his conduct to the requirements of the law that he was charged with violating (J.A. 87, 122). This was in conformance with the Tennessee law of insanity as announced by the Tennessee Supreme Court in its landmark case of *Graham* v. *State*, 547 S.W.2d 531 (1977) wherein the Court disregarded the long—standing "right from wrong" *M'Naughten* test of insanity and replaced it with the

ALI Model Penal Code test that holds that a person is not legally responsible for his criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. The *Graham* Court specifically noted that this rule combined the essential elements of cognition, volition and capacity to control behavior in a fashion that "is essentially a refinement and restatment of the full *M'Naughten* rule." *Graham*, supra at p. 541.

Construing this doctrine, the Tennessee Court of Criminal Appeals in *Burns* v. *State*, 591 S.W.2d 780 (1979) stated that

> "The question to be determined on the issue of settled insanity is whether '. . . as a result of mental disease or defect the accused lacked substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.' *Graham* v. *State*, 47 S.W.2d 531 (Tenn. 1977), *which in essence would mean that the accused was unable to form the intent to commit the crime.*" (Emphasis added).

Thus, the Court recognized that, whether deemed volitional or cognitive, the essence of a defense of insanity and inability to conform one's conduct to the requirements of the law is that the accused is unable to form the intent necessary to commit the crime. Indeed, this is the very basis for any insanity defense. This is likewise clear from the very early Tennessee case of *State* v. *Anderson*, 2 Tenn. 6 (1804) wherein the Court held that "the idea of *volition or an intent* to kill includes malice prepense," equating volition with the intent to kill necessary for malice aforethought. As stated in Corpus Juris Secundum, *Criminal Law*, § 1 at p. 7 under Criminal Intent,

> "In criminal law, *'intent' means* a state of mind which willingly consents to the act that is done or *free will choice, or volition* in the doing of the act; it means that the act is *voluntary* and that it precedes *from a mind free to act.* (Emphasis added).

Likewise, C.J.S., *Criminal Law*, § 29 at p. 99, defines voluntary act as "All crimes of which intent is a necessary element must be *voluntary*, that is, *they must proceed from the will*,

from a mind free to act, and it is in that sense that a criminal act may properly be said to be done with design, purpose or intent." Accordingly, it is obvious that the State misconstrues the very essence of the law relating to insanity and the particular defense interposed by the accused in the present case. The ability to freely and voluntarily commit the act charged is the very essence of the insanity defense, since a criminal act in order to be accomplished with design, purpose or intent must be "voluntary." It is apparent that *the presumption of malice* contained in the erroneous jury *instructions* in this case, which *informed the jury that it should presume such intent* from the mere fact of the killing, was clearly erroneous, highly prejudicial and *placed the jury in the position of having to disregard the very instructions given them in order to find the accused not guilty by reason of insanity.* There could be no clearer evidence of prejudice under any standard and it would be impossible to conclude that the error was harmless.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

For Publication
December 30, 1985

STATE OF TENNESSEE,

Appellee,

v.

WILLIE JAMES MARTIN,

Appellant.

Shelby Criminal
Hon. Arthur T. Bennett, Judge

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Filed
Dec 30 1985
Jewel Redden, Clerk

OPINION

REVERSED AND REMANDED. HARBISON, J.

In a two-count indictment appellant was charged with murder in the first degree, the first count charging felony-murder during an attempted robbery and the second count charging deliberate, malicious, willful and premeditated homicide.

The jury acquitted appellant of the felony-murder charge but found him guilty on the second count of pre-meditated murder.

At a separate sentencing hearing appellant was sentenced to death by electrocution.

Among several issues presented on appeal, appellant challenges legal sufficiency of the convicting evidence.

The victim of the homicide was Alvin Griffin, who was forty-five years of age. He was shot to death by appellant at about 9:30 p.m. on the evening of November 1, 1980, on Calhoun Street in Memphis. Mr. Griffin was the treasurer of a Masonic lodge chapter, and he had attended a meeting of the lodge just prior to his fatal encounter with appellant.

The lodge hall fronted on the north side of Calhoun Street, an east-west thoroughfare, the building being situated a short distance to the east of the intersection of Calhoun Street and St. Martin, which runs north and south. Just to the west of the lodge building was a small printing shop, and then an establishment known as Ann's Grill. Just west of this place of business was a small vacant lot which was situated at the actual intersection of the two streets.

After leaving the lodge hall, Mr. Griffin took two briefcases to his automobile, which was parked near the southwest corner of the intersection. He then told a friend that he intended to return to the lodge for a short time, and it was during his attempt to do so that he was encountered by appellant on the street in front of Ann's Grill.

Appellant was thirty-six years of age and had been living in St. Louis for several years prior to the summer of 1980. He had returned a few months prior to the night in question, and on that night he had left the residence where he was staying and had visited two other bars or restaurants before going to Ann's Grill. He was carrying a loaded revolver, claiming that he was doing so to keep the weapon away from a younger brother who he feared might use it improperly. Griffin was unarmed.

As appellant emerged from Ann's Grill there was an encounter between him and Griffin. Four eyewitnesses testified that they saw the two men struggling, and several of them testified

that Griffin was urging appellant to let him go. It appeared to the witnesses that appellant was attempting to pull Griffin around the corner of Calhoun Street onto St. Martin. Appellant drew his weapon, struck Griffin in the head with it and then fired a shot at point-blank range which entered Griffin's left ear and penetrated the brain. Griffin died a short time later, apparently without regaining consciousness. Appellant fled the scene on foot. Two witnesses testified that he was carrying in his hands some object which they thought to be a paper bag that he had seized from Griffin. One witness followed him in her automobile and testified that after he ran around a corner, he put on a different coat or jacket and pulled his trouser legs from inside his boots and lowered them to cover the boots. She testified that he was laughing and joking with some other companions.

Appellant denied these allegations and testified that the shooting was entirely accidental. He said that Griffin accosted him and stated that he felt that the two men must have met previously. Appellant denied having ever seen or met Griffin before, but he said that their encounter grew increasingly hostile and that Griffin grabbed him by his coat lapel. He said that the two men were shoving each other and that since Griffin was the larger man appellant drew his pistol and struck his assailant. When he tried to strike him a second time the pistol accidentally discharged, and appellant fled.

Appellant had a prior criminal record, a conviction for murder in the second degree in 1968. Mr. Griffin was apparently an exemplary citizen and a respected member of his lodge. The evidence reveals no prior criminal record or misconduct whatever on his part.

The two briefcases which Mr. Griffin had carried from the lodge were found locked in his automobile after he had been taken to the hospital. Neither his wallet nor any other property belonging to him was taken by appellant, as far as the record indicates, except that two witnesses indicated that they saw appellant seize or take something from Griffin which they

thought to be a paper bag. Appellant denied this and said that he simply had his hat in his hand as he was running from the scene.

The issues were sharply drawn and the credibility of both appellant and the State's witnesses presented a classic question for determination by the jury. Apparently having doubt that an attempted robbery had occurred, the jury acquitted appellant on the felony-murder count but found him guilty of premeditated murder.

While the evidence was somewhat close on the question of premeditation and malice, nevertheless we are of the opinion that it was sufficient for submission to the jury. Premeditation is a question of fact to be determined by the jury from all the circumstances surrounding the homicide. *Houston* v. *State*, 593 S.W.2d 267, 273 (Tenn. 1980). Some of the circumstances shown here which in other cases have been found sufficient to support a finding of premeditation are: (1) the victim was retreating or attempting to escape when shot, *Everett* v. *State*, 528 S.W.2d 25, 28 (Tenn. 1975); (2) the victim was unarmed and offered no provocation, *State* v. *Bullington*, 532 S.W.2d 556, 560 (Tenn. 1976); and (3) the accused was cool and calm immediately after the homicide, having been seen by one witness to be laughing and joking with companions, *Sneed* v. *State*, 546 S.W.2d 254, 258 (Tenn. Crim. App. 1976). The bullet which killed the victim was fired from point-blank range, as close as one inch according to the testimony of a pathologist. Appellant had struck the victim at least once prior to shooting him. Repeated blows or shots may support an inference of premeditation. *See Houston* v. *State*, 593 S.W.2d 267, 273 (Tenn. 1980). It is also possible that the jury could have found that during the struggle appellant decided to kill the victim, only a moment of time being required between the plan to kill and its execution. *Clarke* v. *State*, 218 Tenn. 259, 402 S.W.2d 863, 868 (1966).

We are unable to conclude as a matter of law that the evidence as to premeditation and willfulness is insufficient. In our

opinion jury questions were presented as to all of the elements of murder in the first degree.

Since the proof of guilt was highly controverted, however, the jury instructions on the elements of murder in the first degree were particularly important, especially those involving the element of malice.

Malice is an essential element of both murder in the first degree and murder in the second degree.[1] It may be inferred by the trier of fact from the use of a deadly weapon. *Sikes* v. *State*, 524 S.W.2d 483, 485 (Tenn. 1975). In that connection, however, in the jury instructions on murder in the first degree all that the trial judge told the jury concerning the element of malice was that the State must prove beyond a reasonable doubt:

> "(2) that the killing was malicious; that is, that the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victim was killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption; . . ."

In the section of the charge dealing with murder in the first degree, this was the only instruction or explanation given with respect to the element of malice. The term was not further defined. In a separate section on murder in the second degree, full explanations of malice, express and implied, were given.[2] The Court there repeated the instructions that all homicides are presumed to be malicious in the absence of evidence which would rebut the "implied presumption." In that section there was an additional sentence, stating that the presumption could

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[1] T.C.A. §§ 39-2-201, 202, 211.

[2] In first degree murder cases as well as those in the second degree, malice may be either express or implied, but the instructions given here make no such explanation. *See Turner* v. *State*, 119 Tenn. 663, 108 S.W. 1139 (1907).

be rebutted by either direct or circumstantial evidence regardless of whether the evidence was offered by the defendant or by the State. In brackets on the form instructions which were handed to the jurors was a further instruction concerning a presumption of malice sufficient to support a conviction of murder in the second degree where the homicide resulted from the use of a deadly weapon. Here it was stated that "there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances."[3]

There followed other instructions as to the included offense of voluntary manslaughter and involuntary manslaughter, and then general instructions concerning the presumption of innocence and reasonable doubt.

The proposed jury instructions were discussed in detail by counsel and the trial judge in the absence of the jury, but the foregoing instructions with respect to malice were not objected to at the trial nor raised as issues in the motion for a new trial. Nor were any special requests for instructions directed to the issue of malice. Ordinarily, therefore, any issue regarding these instructions would be deemed to be waived.

In death penalty cases, however, this Court is required by statute to review the sentence and to consider significant errors whether or not called to the attention of the trial court. *See State* v. *Duncan*, ____ S.W.2d ____ (Tenn. 1985) (released for publication at Nashville on September 9, 1985); *see also* T.C.A. § 39-2-205(a).

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[3] As stated later in this opinion, the term "presumption" should no longer be used. A permissible inference of malice could be drawn from use of a deadly weapon in first degree murder cases as well as in second degree cases. *Sikes* v. *State*, 524 S.W.2d 483, 485 (Tenn.1975). The instructions given here, based on Tennessee Pattern Instructions—Criminal No. 20.01, do not so indicate except insofar as that pattern instruction states that all homicides are "presumed" to be malicious unless the "implied presumption" is rebutted.

Since the decision of the Supreme Court of the United States in the case of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) the use of the term "presumption" in jury instructions has been constitutionally suspect, except for the presumption of innocence. The Court reiterated the principles of the *Sandstrom* case in the recent decision of *Francis* v. *Franklin*, 471 U.S. ____, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985), emphasizing that no element of a criminal offense is to be presumed, and that jury instructions must not cause a reasonable juror to believe that the accused has the burden of proof as to any element of the offense on trial.

In *State* v. *Bolin*, 678 S.W.2d 40, 44-45 (Tenn. 1984) this Court warned that trial judges should avoid the use of the term "presumption" in instructing juries in criminal cases except for the presumption of innocence. There the Court said:

> "In its place juries may be instructed that a permissible inference may or may not be drawn of an elemental fact from proof by the State of a basic fact,[4] but that such inference may be rebutted and the inference places no burden of proof of any kind upon defendant."

The Committee of the Tennessee Judicial Conference responsible for preparing pattern instructions for use in Tennessee trial courts has promulgated Criminal Pattern Instruction No. 37.19 (Tennessee Pattern Jury Instructions, 1985 Supp.) which emphasizes these principles. That instruction was not given in the present case. However, in fairness to the trial judge, it should be pointed out that the present case was tried in 1983 prior to the opinion of this Court in *Bolin*, *supra*.

Nevertheless, we are of the opinion that the charge on malice contained in the first degree murder instructions, standing alone, was inadequate. It did not use the term "inference," but instead used "presumption." It did not explain that rebuttal

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[4] Of course, inferences can be properly drawn from proof offered by the defendant as well, where the defense elects to introduce evidence.

could be established by evidence from the State or from the accused. It contained an inadequate explanation of the term "Malice."[5] It was preceded by general instructions that the State must establish each of the elements of the offense beyond a reasonable doubt. Other general instructions repeated that proposition although not nearly to the extent as did the instructions in *Bolin*, *supra*. Without some further explanation such as that contained in T.P.I. 37.19, *supra*, we are of the opinion that a reasonable juror could have misunderstood the instructions on malice, and that they were not constitutionally sufficient in light of *Sandstrom* and *Francis*, *supra*.

Because of the closeness of the issues and because the proof of necessity required the jury to draw inferences and to decide questions of credibility, we cannot say that the error in this case was harmless beyond a reasonable doubt. Accordingly we are

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[5] Even though some repetition or cross-references may be involved, in our opinion the court's instructions as to each offense defined for the jurors to consider should be complete within themselves. In Tennessee the jury instructions in felony cases must be reduced to writing and, after being read orally, delivered to the jurors for use in their deliberations. Rule 30(c) T. R. Crim. P. In the present case the only definition of "malice," express or implied, was contained in the instructions on murder in the second degree.

We note that the instructions given by the trial judge in this case followed former T.P.I.-Crim. 20.01 verbatim, but to the extent that this pattern instruction contains no further explanation of malice and to the extent that it misues the term "presumption" as heretofore indicated, it is expressly disapproved, and it should no longer be followed. This pattern instruction was revised in April 1985, and the new form appears to meet the requirements of this opinion. These pattern instructions are not officially approved by this Court or by the General Assembly and should be used only after careful analysis of the case on trial. They are merely "patterns" or suggestions and serve no other purpose. It is the responsibility of the trial judge to prepare the jury instructions, and while previously printed forms may be convenient, these must be revised or supplemented if necessary in order to state the applicable law fully and accurately.

constrained to reverse the judgment of the trial court and to remand this cause for a new trial.

We have considered all of the other issues raised in the brief of appellant, and we find them to be without merit. As previously stated, we are of the opinion that the convicting evidence was sufficient to present an issue for determination by the jury with respect to murder in the first degree. This Court has previously passed upon the constitutional attacks upon the death penalty made by appellant and upon the question of individual *voir dire* of prospective jurors. *See generally State* v. *Caldwell*, 671 S.W.2d 459 (Tenn. 1984), *cert. denied*, 105 S. Ct. 231 (1984); *State* v. *McKay*, 680 S.W.2d 447 (Tenn. 1984); *State* v. *Workman*, 667 S.W.2d 44 (Tenn. 1984).

At the sentencing phase a member of the staff of the Criminal Court Clerk testified about the prior conviction of appellant for murder in the second degree. Inadvertently, and almost incidentally in her testimony, she referred to the fact that he had been indicted for murder in the first degree but was convicted of murder in the second degree. Appellant assigns his testimony as error, but in our opinion the testimony of the clerk was nothing more than a part of identifying her records. This was not an attempt by the State to prove some prior accusation, arrest or indictment such as was found to constitute error in *State* v. *Buck*, 670 S.W.2d 600 (Tenn. 1984), *State* v. *Teague*, 645 S.W.2d 392 (Tenn. 1983) and other cases. Nevertheless, upon retrial, the reference to the fact that the accused had been indicted for a higher offense and convicted of a lesser offense should be avoided.

Appellant offered two special requests with respect to his plea of self-defense. In our opinion the instructions given by the trial judge adequately covered this issue. Nor do we find any error in permitting a witness to testify as to her sensory perception or conclusion that appellant was attempting to pull Mr. Griffin around the corner during the course of their struggle.

All of the issues raised by appellant are overruled except those pertaining to the jury instructions referred to above. The judgment of the trial court is reversed and the cause is remanded for a new trial at the cost of the State.

/s/ _____
WILLIAM J. HARBISON, J.

Cooper, C.J., Fones, J., and
McLemore, Sp. J., concur;
Brock, J., files partial dissent.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

For Publication
December 30, 1985

STATE OF TENNESSEE,

Appellee,

v.

WILLIE JAMES MARTIN,

Appellant.

Shelby Criminal
Hon. Arthur T. Bennett, Judge

OPINION CONCURRING IN PART;
DISSENTING IN PART

With respect to the constitutionality of the death penalty, I adhere to the views expressed in my dissenting opinion in *State* v. *Dicks*, Tenn., 615 S.W.2d 125, 132 (1981); in all other respects I concur in the opinion of the Court.

/s/ _____
BROCK, J.

Filed
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No. 84-1974

In The

Supreme Court of the United States

October Term, 1985

JIMMY C. ROSE, WARDEN,

Petitioner,

vs.

STANLEY BARHAM CLARK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

ARGUMENT IN RESPONSE TO BRIEF FOR THE RESPONDENT

A. Introduction

In petitioner's opening brief, it was explained that (1) jury instructions, like those given here, containing an erroneous presumption are subject to a harmless error analysis (Pet. Br. 10-18), and (2) the error in these instructions was harmless, since respondent's defenses did

not raise a genuine factual dispute on the issue of malice and since the state's proof of malice was conclusive (Pet. Br. 18-29). Although respondent contests both propositions, there are several points that he does not dispute. *First*, in *United States v. Frady*, 456 U.S. 170 (1982), this Court held that the defendant, whose defense, like respondent's, was nonparticipation in the crime, was not prejudiced by jury instructions that are not materially different from those given here (Pet. Br. 20-21; U.S. Br. 18-19, 22-25). *Second*, virtually every federal court of appeals and most state courts have ruled that jury instructions like those given here can be harmless in an appropriate case. (U.S. Br. App. 1a-7a; Calif. Am. Br. 35-36 & n. 4).[1] *Third*, given the factual findings that the jury had to make in order to find respondent guilty of first degree murder, unless the error in this case also affected those findings, respondent's claim of prejudice must necessarily fail as a matter of law (Pet. Br. 20 & n. 19; U.S. Br. 23-24). *Fourth*, the instructions on malice given in this case were given in Tennessee murder prosecutions (and elsewhere nationwide) since the time of Andrew Jackson (Pet. Br. 26; U.S. Br. 16-17; Pet. App. A12, n. 7). Thus, even if such instructions are now erroneous under this Court's 1979 decision in *Sandstrom v. Montana*, 442 U.S. 510, their historic use is powerful evidence that these errors cannot be excepted from the harmless error doctrine in every case.

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[1]Although the Eighth Circuit has ruled that such errors cannot be harmless, the United States has filed a petition for a writ of certiorari in a case presenting that issue from that court, *United States v. Ben M. Hogan Co.*, No. 85-1067, petition for cert. pending.

B. Respondent Was Not Prejudiced By The Malice Instructions

In his brief the respondent argues that the jury instructions prejudiced him in three respects. First, there is the claim that the instructions prejudiced the jury's consideration of malice. Second, respondent contends that the presumption affected the jury's consideration of his defenses. Third, respondent argues that the malice instructions affected the jury's consideration of the other elements of first degree murder.[2]

1. Respondent does not really deny that the proof is sufficient to establish that he shot both victims in the head at point-blank range, that such proof is sufficient to establish malice, and that the malice instructions had no bearing on the issue of who killed Joy Faulk and Charles Browning. Instead, respondent argues that he was prejudiced because the malice instructions affected his defense

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[2]Respondent suggests that his failure to object at trial to the instructions on malice can be explained on the ground that Tennessee law does not require a timely objection to jury instructions in order to raise a claim on appeal. (Resp. Br. 28). While that statement is correct as a matter of state law, *see Tenn. R. Crim. P. 30(b)*, respondent's argument is beside the point in this case. The point is not that respondent waived his right to appeal this issue, rather the point is that respondent surely would have sought to persuade the trial court not to give these instructions if he thought they were prejudicial to him. Respondent's argument that such an objection would be futile is likewise unavailing. At the time of the instant trial, several courts had ruled that instructions like those given here should not be used. *See, Sandstrom v. Montana*, 442 U.S. 510, 517-518 (1979) (collecting cases). In fact, respondent did raise this issue on appeal following *Sandstrom*. Respondent's failure to object at trial to these instructions therefore shows that he did not believe they were prejudicial.

that he shot Faulk and Browning in self-defense or due to provocation sufficient to cause him in a state of passion that would render the killings no more than voluntary manslaughter (Resp. Br. 14, 15-17). Petitioner submits, however, that that argument is not supported by the record.

The central flaw in respondent's argument is that he was convicted of the first degree murder of Faulk, and there is no evidence in the record that would support the claim that she provoked him to kill her. In fact, the only evidence that bears on this issue is the proof that respondent repeatedly threatened to kill Faulk if he found her with another man (See Pet. Br. 5, 27). Respondent does not argue to the contrary; instead, he contends that the evidence was sufficient to support a self-defense or manslaughter verdict on the killing of *Browning*. However, respondent never presented a self-defense or adequate provocation theory to the jury in this case. The foregoing discussion also demonstrates that any defense claim that respondent killed Browning in self-defense or in a state of passion would have had no bearing on his liability for the murder of Faulk, who was unarmed and who had never threatened respondent.

Further, the record shows that Browning was found in the truck with a gun in his pocket, and the cylinder turned in such a manner that the sole spent cartridge could not have just been fired from the gun (J.A. 26, 30). In fact, none of the state appellate judges, nor the federal judges, who have examined this record as much as referred to a self-defense or provocation defense. Indeed, the trial judge instructed the jury on a manslaughter theory merely out of an abundance of caution (J.A. 83). Thus,

it is submitted that respondent's self-defense and adequate provocation defenses are factually very weak.

2. The malice instructions did not prejudice respondent's insanity and voluntary intoxication defenses.

a. Respondent and amicus National Association of Criminal Defense Lawyers, et al., maintain that the malice instructions prejudiced respondent's defenses that he lacked the mental states necessary for murder due to mental illness and voluntary intoxication (Resp. Br. 14-15 and n. 2, 22-23, 30-35; Nat'l Ass'n Am. Br. 12-19). However, respondent does not deny that the instructions at his trial did not allow the jury to consider his claim of intoxication in connection with second degree murder, Pet. Br. 22-24; *see* J.A. 195; nor did those instructions permit the jury to consider his claim of mental illness at all except in connection with his insanity defense (Pet. Br. 20-22; *see* J.A. 190-193). Furthermore, respondent has cited no Tennessee decision holding that voluntary intoxication is a defense to second degree murder or that mental illness may be presented in the form of a diminished capacity defense, rather than an insanity defense. In fact, the decided cases have expressly held to the contrary, Pet. Br. 22-25, as respondent reluctantly concedes, (Resp. Br. 33, 35-40.).[3]

b. Respondent and amicus ACLU claim that the malice instructions prejudiced respondent's insanity defense, hypothesizing the jury relied on the presumption of malice when considering that defense (Resp. Br. 48-50;

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[3]Respondent's argument that these state law doctrines are unconstitutional, *see* Resp. Br. 35-43, is discussed *infra*, at p. 9.

ACLU Am. Br. 25-26). It is respectfully submitted, however, that that argument is flawed in three respects.

First, there is no support in the jury instructions for the claim that the malice instructions affected the jury's consideration of respondent's insanity defense. The instructions on malice related only to that element of the charged offenses. The trial court instructed the jury to consider respondent's insanity defense only if and after it found that he was guilty of one or more of the charged crimes (J.S. 190). Nowhere did the trial court instruct the jury that the presumption of malice had any relevance to its consideration of the insanity defense or to any other aspect of the case. Nor is there any reason to conclude that the jury would have believed that this presumption had any bearing on respondent's insanity defense. The jury instructions on malice and insanity do not at all refer to one another and the trial court separately and carefully explained the different burdens of production and proof on the issue of insanity (Compare J.A. 184-185, 186-187 [malice], with J.A. 190-193 [insanity]). Accordingly, it is submitted that there is no realistic possibility that the jury could have been confused on this point.[4]

Secondly, respondent's claim of prejudice is inconsistent with the nature of the insanity defense he asserted at trial. Respondent's insanity defense was based upon

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[4]Given the fact that the jury was clearly told to consider the insanity defense separately from the question of guilt, respondent's claim on this point is essentially an assertion that the jury necessarily rejected his insanity defense because it had already found him guilty of murder. Such an assertion, however, has nothing to do with the malice instructions, and it assumes that the jury defied the trial court's express charge to consider respondent's insanity defense on its own merits.

an asserted volitional impairment, not a cognitive impairment. Put differently, he did not claim that he lacked the ability to appreciate the wrongfulness of his conduct; rather, he maintained that he lacked the capacity to conform his conduct to the requirements of law, *i.e.*, that he could not stop himself from killing Faulk and Browning (Resp. Br. 48). Since the malice instructions did not help the State prove that respondent had the volitional capacity to keep from shooting Faulk and Browning, those instructions could not have prejudiced his insanity defense.

Last on this point, respondent's argument must fail since *Sandstrom* does not apply to the issue of insanity. *Sandstrom* was based upon the due process principle enunciated in *In re Winship*, 397 U.S. 358 (1970), that the State must prove every element of a charged offense beyond a reasonable doubt. *See*, 442 U.S. at 520; *accord*, *Francis v. Franklin*, 471 U.S. —, 105 S.Ct. 1965 (1985). However, it is settled that the States does not have to prove that a defendant was sane at the time that he committed a crime and that the burden of proof on an insanity defense can be placed on the accused. *See*, *Patterson v. New York*, 432 U.S. 197, 205, 207 (1977); *Rivera v. Delaware*, 429 U.S. 877 (1976), dismissing appeal for want of a substantial federal question from *Rivera v. State*, 351 A.2d 561 (Del. 1976); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); the Comprehensive Crime Control Act of 1984, 98 Stat. 2057 (to be codified at 18 U.S.C. 20) (requiring the defendant to prove that he is insane). Accordingly, any affect that the jury instructions on malice may have had on respondent's insanity defense is purely a matter of state law, not federal constitutional law.

c. Finally, respondent asserts that the Tennessee law of homicide is unconstitutional in two respects. First, he claims that the principle that voluntary intoxication is not a defense to second degree murder stems from the same presumption of malice that was held unlawful in *Sandstrom*. Second, he argues that this definition of second degree murder is unconstitutional because it denies an accused the right to adduce relevant evidence bearing on his mental state (Resp. Br. 32-43). Accordingly, he claims that the malice instructions prejudiced him because it deprived him of the right to have the jury consider the fact that he was voluntarily intoxicated in deciding whether he acted with malice aforethought. However, it is respectfully submitted that respondent's argument is flawed in several respects.

Respondent has never before advanced either argument in support of his claim that the jury instructions on malice are invalid. Respondent did not present either argument at trial, on appeal to the state court of appeals, in the district court, or in the court of appeals. Accordingly, aside from the fact that the Tennessee courts would be likely to hold that he had waived these claims by failing to object on these grounds at trial, respondent clearly has not exhausted these claims in the state courts and therefore may not raise them for the first time in a federal habeas corpus proceeding. *See, Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270 (1971).

Respondent ignores the fact that the jury rejected his voluntary intoxication defense when it found him guilty of the first degree murder of Joy Faulk. The jury was instructed that it could consider the fact that respondent was voluntarily intoxicated in connection with the ele-

ments of deliberation and premeditation under first degree murder and was told that voluntary intoxication may render a person incapable of forming those mental states (J.A. 193-195). However, the jury found respondent guilty of the first degree murder of Joy Faulk, which indisputably proves that the jury found that respondent's asserted voluntary intoxication[5] did not raise a reasonable doubt as to his guilt of that crime. Respondent has offered no plausible basis for believing that the jury would have accepted his intoxication defense if it were permitted to consider this evidence in connection with the element of malice aforethought even though the jury rejected that defense in connection with the elements of premeditation and deliberation (See U.S. Br. 28). Accordingly, even if respondent had the right to present a voluntary intoxication defense, the instructions on malice could not have prejudiced that defense.

Third, there is no federal constitutional requirement that the states adopt a diminished capacity defense either for mental illness or voluntary intoxication. The Supreme Court on three separate occasions has rejected the argument that a defendant has the constitutional right to present a diminished capacity defense based on mental illness. *See, Fisher v. United States*, 328 U.S. 463 (1946);

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[5]Respondent's voluntary intoxication defense was also quite weak. (See Pet. Br. 22, n. 22). Respondent did not testify at trial, and he offered no direct proof that he was intoxicated at the time of the crimes. The only evidence of his voluntary intoxication was offered through the testimony of the two defense psychiatrists, who based their testimony on respondent's statements to them. Significantly, respondent's supposed amnesia did not disable him from remembering that he was intoxicated at the time in question.

Coleman v. California, 317 U.S. 596 (1942), dismissing appeal for want of a substantial federal question from *People v. Coleman*, 20 Cal.2d 399, 126 P.2d 349 (1942); *Troche v. California*, 280 U.S. 524 (1929), dismissing appeal for want of a substantial federal question from *People v. Troche*, 206 Cal. 35, 273 P. 767 (1928); *cf. Leland v. Oregon*, 343 U.S. at 800-801 (there is no federal constitutional right to present an "irresistible impulse" defense); *see also, Muench v. Israel*, 715 F.2d 1124, 1126-1130 (7th Cir. 1983), cert. denied, No. 83-6358 (June 4, 1984). Congress also rejected that defense for federal criminal prosecutions in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 402 (Insanity Defense Reform Act of 1984), 98 Stat. 2057 (to be codified at 18 U.S.C. 20). *See* S. Rep. No. 225, 98th Cong., 1st Sess. 229 (1983); (U.S. Br. 26 & 26-27, n. 24). Accordingly, if a defendant has no right to present a diminished capacity defense based upon mental illness, which is, of course, involuntarily acquired, then it necessarily follows that there is no right to present that defense where voluntary intoxication is at issue.

Sandstrom adds no support to respondent's claim. As noted above, *Sandstrom* was based upon *In re Winship*, *supra*, and *Winship* does not require the states to define murder in any particular fashion or to accept mental illness and voluntary intoxication as defenses. *See, Patterson v. New York*, *supra*. Respondent has confused the right to present relevant evidence on an element of the crime or an element of a defense—a principle that is neither in dispute nor pertinent to this case—with the claim that the state must define homicide in a manner that makes certain types of evidence relevant—a proposition that also

is not at issue in this case, but which, if it were, would offer respondent no support for his argument.

3. Respondent claims in passing that the instructions on malice may have affected the jury's consideration of first degree murder (Resp. Br. 26-27). However, it is submitted respondent is in error in this regard. The trial court clearly told the jury that, to convict respondent of first degree murder, the state had to prove five separate elements beyond a reasonable doubt, J.A. 184-185, including that the killings were "willful," "deliberate," and "premeditated": *i.e.*, that the defendant acted with the "cool purpose" of an intent to kill that was formed prior to the shootings. The malice instructions could not have affected the jury's findings on these elements of first degree murder.

The trial court, when instructing the jury on malice in connection with first degree murder, defined malice as "the state of mind to do the alleged wrongful act without legal justification or excuse." (J.A. 184-185). The absence of a legal justification or excuse for the *act* of killing plainly has nothing to do with the *mental states* necessary for first degree murder. The trial court's instructions on the elements of willfulness, deliberation, and premeditation could not have been affected by this instruction on malice. That conclusion also holds true when the court's instructions on second degree murder are considered. The trial court explained that express malice was a "wicked intent[,] . . . an intent to do any injury to another, a design formed in the mind of doing mischief to another[,] . . . and exists where a person actually contemplates the injury or wrong he inflicts." (J.A. 186). No reasonable juror would fail to see a difference between

an intent to *injure* someone and the intent to *kill* that person; the contrary conclusion would mean that a reasonable juror could not distinguish between assault and battery, which generally requires only an intent to injure, and murder, which generally requires an intent to kill.[6]

In sum, the trial court's erroneous instructions on malice could not have affected the jury's finding that respondent was guilty of willful, deliberate, and premeditated murder.[7]

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[6]Accordingly, given the jury's findings underlying its first degree murder verdict, the trial court's instructions on implied malice are necessarily harmless, because the jury's verdict shows that it did not rely on these instructions. In any event, the instructions on this issue were also harmless, even considered by themselves.

The trial court defined implied malice as "that condition of the mind which indicates a wicked, depraved and malignant spirit, and a heart regardless of social duty and fatally bent on mischief" (J.A. 187), which exists where "the wrongdoer did not intend to slay the person killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life," *id.*; *i.e.*, where "there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice." *Id.* Once again, this definition of malice could not have affected the jury's finding that respondent killed willfully, deliberately, and with premeditation because it applies only where a person intends to commit an act with knowledge that the act may jeopardize human life. Obviously, intent to commit an act is entirely different from an intent to produce a *result* of that act, *viz.*, the death of the victim; that difference forms the basis of the distinction between general and specific intent crimes. *See United States v. Bailey*, 444 U.S. 394, 403 (1980).

[7]Respondent also relies on the Tennessee Supreme Court's decision in *State v. Martin*, Shelby Criminal Tennessee Supreme Court Opinion filed December 30, 1985 (not yet published), as support for his claim that the instructions on malice affected the

(Continued on next page)

C. A Harmless Error Inquiry Is Appropriate

1. Respondent, but neither amicus, claims that the jury instructions on malice amounted to a directed verdict on that question. (Resp. Br. 12-13). However, respondent makes no attempt to claim that the record in this case supports his argument, and the reason why is clear. The state trial court clearly did not direct a verdict of guilty in the state's favor on malice; on the contrary, the court expressly told the jury that it had to decide what, if any, offenses the state had proved and that the state had to prove every element of each offense beyond a reasonable doubt. (J.A. 182-190). In addition, even if a *conclusive* presumption can be treated as a directed verdict—a proposition that the State would dispute, *see* U.S. Br. 14-17—here, only a *rebuttable* presumption is in dispute. Respondent's reliance on *Connecticut v. Johnson*, 460 U.S. 73, 85-86 (1983) (plurality opinion), is therefore misplaced.

There is also no reason to treat the malice instructions in this case as the equivalent of a directed verdict. The jury instructions used here have as ancient a pedigree as the principle that the trial court may not direct a verdict in the government's favor. (See U. S. Br. 16-17). It is

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(Continued from previous page)

jury's first degree murder verdict. (Resp. Br. 13, 45-48). However, as noted earlier, *Martin* did not cite, much less distinguish, this Court's ruling in *United States v. Frady, supra*. In any event, to paraphrase *Sandstrom*, while the Tennessee Supreme Court is the final authority on the meaning of malice aforethought under state law, it is not the final authority on the interpretation which a jury could have given the instructions on malice. 442 U.S. at 516-517. For the reasons given in the text, in petitioner's opening brief, and in the U.S. amicus brief, the instructions on malice could not have affected the jury's finding that respondent killed willfully, deliberately, and with premeditation.

implausible to claim that the hundreds of judges who have used these instructions in criminal cases have unwittingly directed verdicts in the state's favor in every case. Whatever force respondent's claim may have as an academic matter, the history of American criminal law clearly proves him wrong.

2. Finally, there is no reason to presume that instructions like these are prejudicial. As discussed above, in petitioner's opening brief, and in the supporting amicus briefs, respondent was not prejudiced by these instructions. Moreover, the federal and state courts have repeatedly, and with near unanimity, found that other defendants were not prejudiced by these instructions. (See U.S. Br. App. 1a-6a; Calif. Am. Br. 35-36 & n. 4). These courts have had no difficulty in distinguishing between the cases, like this one, in which a defendant is not prejudiced and those cases in which the contrary is true. In these circumstances, there is no good reason for denying the State an opportunity to prove that the error was harmless.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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No. 84-1974

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JIMMY C. ROSE, Warden,

Petitioner,

vs.

STANLEY BARHAM CLARK,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

"Whether error in the state trial court's jury instructions on malice was harmless beyond a reasonable doubt?"

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INTEREST OF AMICUS CURIAE

The State of California appears as a friend of the Court in support of petitioner pursuant to Supreme Court Rule 36.4.

No. 84-1974

In The

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JIMMY C. ROSE, Warden,

Petitioner,

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Respondent.

On Writ of Certiorari to the
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For the Sixth Circuit

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

SUMMARY OF ARGUMENT

The costs of automatic reversal would be high and would fall most severely on those states which by their waiver of procedural default rules are most open to claims of federal

constitutional error. We ask the Court to be very sure an automatic rule is truly necessary.

The harmless error rule replaces technicality with judgment. Judgment requires appraisal of the entire record, including the evidence, examining every factor which might inform as to the influence of error.

The Court steadfastly has remained committed to such judgment. In some cases, prejudice has been assessed as part of the determination whether error has occurred; in others, only after error is established; in still others, as a factor in deciding whether to overlook procedural default. But in all cases, including even those which "presume" prejudice, prejudice assessment is part of the exercise of judgment.

The Court ought not to retreat from this rule to hold presumption error

reversible per se on an abstract possibility of prejudice alone. Abstract analysis may appeal in logic, but as an exercise in judgment it fails. The large majority of circuit and state courts that have adopted harmless error rules for these kinds of cases caution strongly against concluding that the constitutional values at stake can only be protected by an automatic, abstract rule. Evidence and other circumstances of the case indubitably affect jury construction of instructions and the harm that might have been suffered. Cases that hold reversal must follow upon the possibility of unconstitutionality do not stand for the proposition that such circumstances and evidence must be ignored.

Harmless error rules serve, not subvert, constitutional values. The proper reach of a harmless error rule

is a function of the constitutional values at risk.

Burden-shifting presumptions implicate the constitutional interest in accurate and reliable verdicts. A prejudice requirement which asks whether such error has "undermined confidence in the outcome" will fully protect a defendant against any reasonable possibility of harm while leaving intact those convictions in which there is no reasonable doubt that the verdict is reliable. Conclusive presumptions implicate both the constitutional interest in accuracy and the defendant's interest in a nonjudicial factfinder. The latter interest is protected by a prejudice requirement which asks whether in light of all the evidence and circumstances there is a reasonable possibility the jury did not decide an essential issue.

Neither of these examinations should be made in the abstract. Many circumstances in addition to the evidentiary posture of the case may show beyond reasonable doubt that error caused no real harm to the constitutional interest at stake.

It is not necessary to adopt a rigid, automatic reversal rule. These tests will discover every case in which there is a risk of unjust conviction or of a material deprivation of jury fact-finding. That judgment will vary in each case as the circumstances vary does not impeach its legitimacy. We ask the Court not to retreat from its commitment to judgment.

ARGUMENT

I.

THE COSTS OF A RULE OF AUTOMATIC REVERSAL WILL BE HIGH, AND WILL BE FELT MOST SEVERELY BY THOSE STATES WHICH PRESENTLY ARE MOST OPEN TO CLAIMS OF FEDERAL CONSTITUTIONAL ERROR.

We wish to stress at the outset the considerable costs which would follow from a rule of automatic reversal, for we fear they could be underestimated. We ask the Court to be very sure, before adopting any rigid rule, that it is a genuine necessity.

We do not suggest there is much to fear from current "presumptions" cases. The chief lesson of Sandstrom v. Montana, Connecticut v. Johnson, and Francis v. Franklin[1/] may be never to use the word "presume." A judge who uses the term

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1. Sandstrom v. Montana, 442 U.S. 510 (1979); Connecticut v. Johnson, 460 U.S. 73 (1983); Francis v. Franklin, 105 S.Ct. 1965 (1985).

today, when the equally serviceable "may infer" is available, hasn't been paying attention. New cases containing such error will be few. See generally People v. Roder, 33 Cal.3d 491, 505-07 (1983) (all criminal presumptions affecting the burden of proof construed to be permissive inferences).

The difficulty lies rather in cases decided before adjustment to Sandstrom and in cases concerned with new issues in which Sandstrom principles are implicated.

In California, for example, the state supreme court has ruled the standard jury instruction concerning aiding and abetting has for some years been deficient in omitting specific reference to intent. People v. Beeman, 35 Cal.3d

547 (1984).[2/] It is being retroactively applied by the lower courts. E.g., People v. Olmedo, 167 Cal.App.3d 1085, 1091-92 (1985); People v. Henderson, 163 Cal.App.3d 1001, 1009 (1985).

The number of cases containing aiding and abetting instructions is legion. If, as the state supreme court suggested, the error is closely akin to Sandstrom error because it removes the issue of intent from the jury's

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2. The defective instruction required proof only that the aider and abetter "aids, promotes, encourages or instigates by act or advice the commission of such crime" "with knowledge of the unlawful purpose of the perpetrator of the crime." The California court ruled this sufficiently ambiguous to permit conviction upon an intentional act which aids without intent to encourage or facilitate, as where the aider and abettor aids negligently or accidentally through his intentional act. The court analogized the instruction to a presumption which effectively eliminates intent as an element by permitting conviction regardless of whether the trier of fact has found intent. People v. Beeman, 35 Cal.3d at 559-61.

consideration, People v. Beeman, 35 Cal.3d at 559, 561 n.4, and if, further, such error were deemed by this Court reversible per se, then the number of judgments which would have to be set aside would be extreme. Aging evidence, fading memories, missing witnesses, and other difficulties would lead to complete release of many defendants about whom there is absolutely no doubt of guilt.

Still more instructional ambiguities that a jury might have understood as eliminating need for proof of one element or another can be forecast. E.g., Carlos v. Superior Court, 35 Cal.3d 131 (1983)(felony-murder special circumstance requires proof that accomplice had intent to kill). The specific error at issue in Sandstrom may disappear, but the rule of review established for such kinds of error will have wide sweep.

It can be answered that the states may "insulate" themselves from these effects, if they wish, "by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977).

Not every state possesses this "normal" rule, and those that do often couch it with exceptions that historically have been liberally construed. E.g., Cal. Penal Code § 1259 ("The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendants were affected thereby.").

When this liberality of review is coupled additionally with the natural tendency of many intermediate appellate courts to "insulate" their decisions

from reversal by reliance on substantive lack of merit or harm as well as the procedural ground, the mechanism of control suggested in Hankerson is left toothless. See, e.g., Curry v. Wilson, 405 F.2d 110, 111-12 (9th Cir. 1968) (where California court relied both on waiver and the merits to reject claim, federal court will examine merits); cf. Engle v. Isaac, 456 U.S. 107, 124-25 nn.26-27 (1982); Hankerson, 432 U.S. at 244 n.8; Warden v. Hayden, 387 U.S. 294, 297 n.3 (1967).

Ironically, it will be the states that have been most open to claims of federal constitutional error, most willing to examine the merits to search out injustice, which thus would be called upon to bear the heaviest burden of any rule of automatic reversal. Many, many decisions already have been rendered in which the state court

routinely has examined the merits and has not relied solely on a procedural default. If every one of those decisions thereby is made subject to automatic reversal without regard to harm whenever the inevitable habeas corpus petition is filed, a heavy price for sensitivity to constitutional concerns will have been exacted.

Were there something truly fundamental at stake in each such case, the burden would be willingly borne. But the error in Sandstrom-related cases may be largely hypothetical. The abstract possibility of error, a possibility expressly determined without regard for the total circumstances of the case, would be enough to compel reversal.

We offer an example. Two defendants by the overwhelming weight of the evidence jointly participated in executing their victim. One defendant

shot the victim with a shotgun, critically wounding but not immediately killing him. While the wounded man knelt begging for his life, the other defendant shot him in the head with a pistol. To prevent further splash of blood and tissue, this defendant then wrapped the victim's head in a towel before administering a final coup de grace.

Of the defendants' individual intent to kill, and intent to aid each other in the killing, there can be no doubt. That the jury must have found such intent likewise does not admit of reasonable doubt. Yet because mutual aiding and abetting instructions were given, instructions that omitted specific reference to intent, and because the state court examined the merits in the course of finding the error harmless, the case is open to

automatic reversal on habeas corpus should this Court establish an automatic reversal rule in this case. Neither defendant is likely to be retried as, fearing the defendants' eventual release, several key witnesses expressed an intent to "lose" themselves in other states after their testimony.

A state which is willing to overlook a lack of objection in a hundred such cases to search for that one where there may be a realistic possibility the defendant is innocent or was unjustly convicted may not be quite so willing if it later can be compelled to reverse every single one of the hundred. It may instead, perforce, answer the rigid federal rule with its own rigid state procedural rule, as the Court has suggested.

We submit this outcome is both unnecessary and detrimental to the best

interests of justice. A rule of review which takes realistic account both of the possibility of error and of harm is fully capable to sort out that case where the defendant indeed might be innocent or might have been deprived of his right to a jury trial without simultaneously requiring retrial or release of the ninety-nine as to whom there is no reasonable doubt. "What the harmless-error rules all aim at is a rule that will save the good . . . while avoiding the bad, so far as possible." Chapman v. California, 386 U.S. 18, 23 (1967).

II.

THE COURT SHOULD NOT RETREAT FROM JUDGMENT.

A.

The question certified for revie evinces the renewal of a very ol dispute. Historically, the Court ofte has been divided on the question o whether constitutional protections are s fundamental that any deprivation mus result in reversal, or whether when th possibility of error in the full contex of the case appears but slight, som constitutional errors may legitimately b deemed harmless.

The former view was that every erro necessitated reversal. Appellate court became "'impregnable citadels of techni- cality,'" trials "a game for sowin reversible error in the record . . . ." Kotteakos v. United States, 328 U.S. 750, 759 (1946).

The harmless error rule was a remedial effort by the great leaders of the profession

> to substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors . . . will engender . . . .

Id. at 760.

Necessarily, Justice Rutledge observed, the command was easier to render than to observe.

> This [was] in part because it was general; but in part also

> because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance.

Kotteakos, 328 U.S. at 761 (citatio omitted)(emphasis added).

Certain "aids to right judgment were spelled out:

> Thus, it is not the appellate court's function to determine guilt or innocence. Nor is it

to speculate upon probable reconviction and decide according to how the speculation come out . . . . Those judgments are exclusively for the jury . . . .

But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum . . . . [T]he question is, not were [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had

> upon the jury's decision. . . .
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason.

Id. at 763-64 (citations omitted (emphasis added).

The emphasis throughout is upo judgment, judgment which require realistic appraisal of the totality of case, examining every factor which migh inform as to the influence of an error. It seeks realism.

Harmless error thus eschews abstract analysis:

> These are the abstract similarities. They are only abstract. To strip them from the separate and distinct total contexts of the two cases, and to disregard the vast differences in those contexts, is to violate the whole spirit, and we think the letter also, of [the harmless error rule].

Id. at 772.

Hence, Justice Rutledge insisted, error must be assessed "in relation to all else that happened." Id. at 764. Its measurement takes account not only of the nature of the error, but also its timing, other instructions, the evidence, everything.

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight

> effect, the verdict and the judgment should stand . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error,. . . or if one is left in grave doubt, the conviction cannot stand."

Id. at 764-65 (emphasis added).

The Kotteakos Court left open the possibility that violation of certain constitutional norms might be reversible per se. Id. at 764-65. Equally, it expressed respect both for the rationality and necessity of jury decisionmaking on vital points, refusing to countenance a construction of instructions which would have premised the verdict on a view which, in context, it was probable the

jury had not adopted. See id. at 769-74, citing Bollenbach v. United States, 326 U.S. 613 (1946).

In Chapman v. California, 386 U.S. 18, the Court extended the principles outlined by Justice Rutledge to review of most constitutional error. The significance of evidence as an aid to right judgment was expressly affirmed in Harrington v. California, 395 U.S. 250 (1969). The Court held that even Bruton error, error consisting in the admission of evidence too potent for the jury to have ignored, could be found harmless if there was other overwhelming evidence of guilt.[3/] Consideration of the

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3. Bruton v. United States, 391 U.S. 123 (1968)(admission of non-testifying codefendant's confession denied defendant's confrontation rights notwithstanding limiting instruction, because evidence was of such force that the jury might not have ignored it as directed).

"evidence in this record," Justic Douglas wrote for the Court, "do[es] no depart from Chapman; nor . . . dilute i by inference." "Our judgment must b based upon our own reading of the recor and what seems to us to have been th probable impact of the two confessions o the minds of the jury" in light of th totality of circumstances. Id. at 25 (emphasis added).

Equally, in Schneble v. Florida, 40 U.S. 427 (1972), the Court reaffirmed th Kotteakos principle of respect for th rationality of jury decisionmaking:

> Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions,

stares us in the face.

Id. at 431-32. The confession rationally must have been considered by the jury, but in light of other evidence in the case, it was held not to impeach the validity of the verdict. Id. at 432.

The Court has not departed from this approach in its more recent cases. In Strickland v. Washington, 104 S.Ct. 2052 (1984), and United States v. Cronic, 104 S.Ct. 2039 (1984), the Court held that even a breakdown in the assistance of counsel does not require reversal unless prejudice is shown. Assessment of counsel's performance, Justice Stevens wrote, ought not to be made in the abstract, but in terms of its impact upon the fairness of the entire trial. Cronic, 104 S.Ct. at 2046 n.22. The value of counsel -- and hence the measure of prejudice -- is its contribution to the reliability of the trial

process. Id. at 2045-46. When con
fidence in the reliability of the out
come, the justness of the result, i
undermined by counsel's deficiency
prejudice exists. Strickland, 104 S.Ct
at 2063-64, 2068.

Similarly, in United States v
Agurs, 427 U.S. 97 (1976), and Unite
States v. Hasting, 461 U.S. 499 (1983)
the Court confirmed examination of th
record as a whole as vital to assessmen
of the justice of a conviction. "[T]h
omission must be evaluated in the contex
of the entire record," Justice Steven
wrote in Agurs. "If there is no reason
able doubt about guilt whether or not th
additional evidence is considered, then
is no justification for a new trial."
Id. at 112-13 (materiality of prosecu
torial failure to disclose measured i
terms of impact upon the outcome). "
reviewing court must begin with . .

reality," Chief Justice Burger wrote in Hasting. 461 U.S. at 511 (prosecutorial misconduct, Griffin comment). Automatic reversal is a "'retrea[t] from . . . responsibility,'" a return to the "'citadels of technicality.'" Id. at 509. "'The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.'" Id. at 516 (Stevens, J., conc.)(emphasis added), quoting Kotteakos v. United States, 328 U.S. at 764.

Likewise, in Henderson v. Kibbe, 431 U.S. 203 (1977), and Cupp v. Naughten, 414 U.S. 141 (1973), the Court insisted that prejudice must be gauged "in the context of the overall charge," a context which included the testimony of witnesses, arguments of counsel, receipt of exhibits, as well as other instructions by the judge. Cupp, 414 U.S. at

147. In context, despite "abstract and conjectural" contrary possibilities, the ailing instructions were not of "constitutional dimension," as their deficiencies could not have "'so infected the entire trial that the resulting conviction violates due process'. . . ." Kibbe, 431 U.S. at 154, 156-67; Cupp, 414 U.S. at 147, 149-50.

The Court has confirmed the necessity of a showing of prejudice even against contentions of burden-shifting, presumption-spawned error. United States v. Frady, 456 U.S. 152 (1982); Engle v. Isaac, 456 U.S. 107 (1982). Of the two, Frady is more pertinent as it discussed and applied the standard of "actual prejudice" unalloyed by comity considerations.

The Court did not undertake to define the "degree of prejudice" necessary to reversal, holding it a

variable concept proportionate to the impact which renders a conviction a violation of due process. This formulation, it ruled, "requires that the degree of prejudice . . . be evaluated in the total context of the events at trial." Id. at 169.

The Frady Court rejected the argument that an instruction which may have relieved the Government of the burden of proving an element of the crime beyond a reasonable doubt was of itself enough to overturn the conviction:

> So stated, Frady's claim of actual prejudice has validity only if an error in the instructions concerning an element of the crime charged amounts to prejudice per se, regardless of the particular circumstances of the individual case. Our precedents, however,

> hold otherwise. Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

456 U.S. at 170 (emphasis in original) Justice Stevens concurred because th Court's opinion "properly focus[ed] o the character of the prejudice . . . . Id. at 175; accord, Engle v. Isaac, 45 U.S. at 136 & n.1 (application of caus and prejudice rules depends on type o claim, risk of fundamental miscarriage o justice).

Some of the decisions above assesse prejudice as part of the determination o

whether error occurred. Others considered prejudice only after error had been established. Others, the collateral proceedings, examined prejudice as a factor in deciding whether to overlook a procedural default. But each of them did weigh prejudice at some point in the constitutional equation and all did so in light of the totality of circumstances, including the evidence.

Only one group of cases has been said to reverse without consideration of prejudice, and these cases are better explained as not in fact cases that disregard the need for prejudice but as cases which presume the existence of prejudice. Certain constitutional protections by reason of their "fundamental" character engender such great possibilities of prejudice that are unlikely to be reflected in a record as to make reasonable a presumption of

prejudice without need for actual proof
See, e.g., United States v. Cronic
104 S.Ct. at 2046-47; Strickland v
Washington, 104 S.Ct. at 2067; Hollowa
v. Arkansas, 435 U.S. 475, 489-90 (1978)
Yet the existence of prejudice, actual o
presumed, even in this category of case
remains the ultimate determinant o
reversal.

B.

It is suggested that the Court ough
now to retreat from this steadfast posi
tion and hold presumption error revers
ible per se without regard to prejudice
but upon the abstract possibility o
error alone.

This view posits that instructiona
error which induces a jury to disregar
the necessity of proof of every element
or to find an element upon less tha
proof beyond a reasonable doubt, denie
rights so "fundamental" that the denia

can never be deemed harmless because they are part and parcel of our very definition of due process and justice.

This is irrefutable. When fundamental rights such as these <u>are</u> denied, reversal should follow. We yield to no one in our respect for this principle. Yet how we are asked to arrive at the conclusion that reversible error <u>has</u> occurred is not nearly so persuasive.

Because, exercising abstract logic, we may make out a possibility that the instructions might have been interpreted by a juror to eliminate or shift the burden of proof; and because, adopting the assumption that jurors follow instructions, we are unable to refute the possibility that some juror did apply the instructions in the forbidden manner; and because, citing precedent, the mere possibility that a conviction has been unconstitutionally obtained is

enough to require reversal, reversal is demanded without examination of prejudice. The evidence, the circumstances, even the lack of any actual likelihood that such error did occur, all disappear beneath the blades of this analysis.

As an exercise in logic, it is neat. It does avoid "confusion." Cf. Francis v. Franklin, 105 S.Ct. at 1975 n.8. But as an exercise in the judicial judgment mandated by Kotteakos, it fails.

We cannot agree that a mere abstract possibility of error, a possibility drawn out of a record deliberately shaped to ignore many of the most significant elements of the case, should ever be deemed automatic cause for reversal. The possibility of error is the beginning of judgment, not its end.

The large majority of other courts, state and federal, which have considered this question since Sandstrom have not

found its abstract possibilities such an affront "fundamental" justice as to require automatic reversal without regard to harm. By our count, nine federal circuits and thirteen states now apply some version of Chapman. Only four states have rejected all harmless error rules.[4/] This wide preponderance of opinion should caution strongly against adopting the abstract, automatic view.

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4. E.g., United States v. Winter, 663 F.2d 1120, 1144 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); Fournier v. LeFevre, 734 F.2d 125, 129 (2d Cir. 1984); Tweety v. Mitchell, 682 F.2d 461, 465 (4th Cir. 1982), cert. denied, 460 U.S. 1013 (1983); Fulton v. Warden, 744 F.2d 1026, 1032-34 (4th Cir. 1984), cert. denied, 105 S.Ct. 3532 (1985); Mason v. Balkcom, 669 F.2d 222, 226-27 (5th Cir. 1982), cert. denied, 460 U.S. 1016 (1983); Holloway v. McElroy, 632 F.2d 605, 618 (5th Cir. 1980), cert. denied, 451 U.S. 1038 (1981); United States v. Crowder, 719 F.2d 166, 172-73 (6th Cir. 1983) (en banc), cert. denied, 104 S.Ct. 2352 (1984); Jacks v. Duckworth, 651 F.2d 480, 487 (7th Cir. 1981), cert. denied,

(Footnote continued on next page.)

The idea that jurors must be assume
to have adopted a worst-case hypothesi

Footnote 4 continued:

454 U.S. 1147 (1982); Nelson v. Solem, 640 F.2d 133, 136 (8th Cir. 1981); Hagler v. Callahan, 764 F.2d 711, 714-15 (9th Cir. 1985); Davis v. Kemp, 752 F.2d 1515, 1520-21 (11th Cir.)(en banc), cert. denied, 105 S.Ct. 2689 (1985); State v. Forrester, 657 P.2d 432, 439 (Ariz. Ct.App. 1982); Evans v. People, No. 83SC451 (Colo. Sept. 30, 1985); Parker v. Pace, 331 S.E.2d 546, 546-47 (Ga. 1985); State v. Heads, 385 S.2d 230, 231-32 (La. 1980); Commonwealth v. Gonzales, 470 N.E.2d 403, 404 (Mass. 1984); DeJoinville v. Commonwealth, 408 N.E.2d 1353, 1358 (Mass. 1980); State v. Boyce, 471 A.2d 687 (Me. 1984); People v. Wright, 289 N.W.2d 1, 11-12 (Mich. 1980); State v. McKenzie, 608 P.2d 428, 458-59 (Mont. 1980), cert. denied, 449 U.S. 1050 (1980); People v. Mitchell, 461 N.Y.S.2d 267, 271 (N.Y. 1983); State v. Amado, 433 A.2d 233, 238-41 (R.I. 1981); State v. Gaskins, 326 S.E.2d 132, 142-43 (S.C.), cert. denied, 105 S.Ct. 2368 (1985); State v. Bolin, 678 S.W.2d 40, 45 (Tenn. 1984); Director v. Jones, 329 S.E.2d 33,37 (Va. 1985); Saldana v. State, 685 P.2d 20,23 (Wyo. 1984), cert. denied, 105 S.Ct. 2331 (1985). Contra, State v. Truppi, 438 A.2d 712, 721 (Conn. 1980), cert. denied 451 U.S. (1981); Minor v. United States, 475 A.2d 414, 416 (D.C. 1984); State v. LaForge, 347 N.W.2d 247, 256 (Minn. 1984); State v. Martell, 465 A.2d 1346, 1348 (Vt. 1983).

of instructions is inconsistent with the acknowledgment that in Bruton cases jurors are expressly assumed to have disregarded instructions. See Francis v. Franklin, 105 S.Ct. at 1976 n.9. The theory is that the prejudice of a confession can overwhelm even the clearest and most express limiting instruction. If overwhelming evidence can cause a jury to disregard the plainest instruction, surely overwhelming evidence might distract the jury from instructions which at worst are only ambiguous.

The significance of evidence in the construction and application of instructions cannot rationally be disregarded. Indeed, the chief value of a jury consists in the fact that jurors bring to their task a common sense and experience thought more useful to justice than careful parsing of precedent. See Duncan v. Louisiana, 391 U.S. 145, 156-

58 (1968). Rational jurors inevitably will look to the evidence in determining the applicability of instructions and will disregard abstract possibilities that lack real significance. In fact, they may well be instructed to consider only those instructions which their review of the facts shows are pertinent.[5/] Examination of the evidence thus

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5. Standard California Jury Instruction number 17.31 directs the jury:

> You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the court is expressing any opinion as to the facts.

California Jury Instructions - Criminal, No. 17.31 (4th ed. 1980)(emphasis added).

is essential to any consideration of how a rational jury might reasonably have understood and applied jury instructions.

Precedent confirms this common sense:

> The crucial thing is the impact of the thing done wrong . . . in the total setting. [¶] This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, . . . and not . . . as . . . without reason.

Kotteakos, 328 U.S. at 764 (emphasis added).

A jury is not likely to have followed a difficult road to conviction when a smoother one was plain upon the

evidence. What reasonable juror, whe the evidence of each element is manifes before him, would engage in an awkwar exegesis of instructions in hopes o avoiding the easy path? The reasonabl juror would take up the evidence and hav done with it. Instructional ambiguit would have meaning only if the evidenc required construction of the ambiguit and the potential error was so paten that the evidence would not have tempere its interpretation.[6/]

The cases sometimes cited a requiring reversal upon the mere possi bility the jury relied upon an unconsti tutional construction of instruction have never held this determination shoul

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6. Occam's Razor has value here See Random House Unabridged Dictionary o the English Language 996 (1966)("maxi that assumptions introduced to explain thing must not be multiplied beyon necessity").

be made in the abstract without regard to the totality of the case and the evidence. One of the leading cases, Bollenbach v. United States, 326 U.S. 607 (1946), in fact was cited with approval in Kotteakos for the opposite principle, the principle that in assessing the impact of the thing done wrong on others' minds "the total setting" must be considered. Kotteakos, 328 U.S. at 765. The instructional error in Bollenbach was patent and clearly had had impact on the jury: it returned its verdict five minutes later. In Stromberg v. California, 283 U.S. 359 (1931), the error also was patent and the possibility of impact on the jury was "far from being a merely academic proposition . . . ." Id. at 368. In Carpenters v. United States, 330 U.S. 395 (1947), the error again was patent

and the case was tried upon the unconstitutional theory. In Leary v. United States, 395 U.S. 6 (1969), the jury was expressly told it could convict under alternative theories, one of which was unconstitutional. In Bachellar v. Maryland, 397 U.S. 564 (1970), the jury again was expressly told it could convict under alternative theories; the Court reversed because "[o]n this evidence" it was "equally likely" the conviction had rested on the unconstitutional ground. Id. at 569, 571.

The point of these cases, we respectfully submit, is simply that evidence of guilt alone will not save a conviction which, after consideration of all of the circumstances of the case, including the evidence, has been reasonably established to rest upon possible constitutional error. These cases do not stand for the proposition that the circum-

stances and evidence should be ignored in determining whether that possibility is reasonable.

C.

We regret that the terms of the grant of certiorari preclude from review the apparent rule that the possibility of constitutional error respecting presumptions must be determined in the abstract. In our view, "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,'" Henderson v. Kibbe, 431 U.S. at 154, ought to be answered after examining the totality of a case, not before. But the prospect of reversal predicated on mere technical analysis is precisely the danger harmless error rules are intended to prevent, and we therefore urge their adoption here.

Harmless error rules are intended to serve, not subvert, constitutional values. "What harmless-error rules all aim at is a rule that will save the good . . . while avoiding the bad, so far as possible." Chapman, 386 U.S. at 22-23. The proper reach of a harmless error rule hence is a function of the constitutional values that are at risk.

Burden-shifting presumptions implicate the constitutional interest in accurate and reliable truth-finding.

> "'Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of

> certitude of the facts in issue.'"

Hankerson v. North Carolina, 432 U.S. at 241. To require a defendant "to prove the critical fact in dispute, is to increase . . . the likelihood of an erroneous . . . conviction." Mullaney v. Wilbur, 421 U.S. 684, 701 (1975).

As with other constitutional errors presenting questions of the reliability of a verdict, the prejudice requirement does not demand certainty that the result is unreliable, but only a showing that such error as may have occurred has so "undermined confidence in the outcome" that the conviction cannot be regarded as just. See Strickland v. Washington, 104 S.Ct. at 2068; United States v. Cronic, 104 S.Ct. at 2045. The reviewing court must be able to declare its belief that there is no reasonable doubt the verdict is

reliable. Compare Strickland, 104 S.Ct. at 2068-69, and Cronic, 104 S.Ct. at 2045-46, with Chapman v. California, 387 U.S. at 24. This assessment is made not in the abstract, but with a view to the impact of the error on the entire trial. Cf. Cronic, 104 S.Ct. at 2045 n.22. It is familiar territory. See Chapman, 387 U.S. at 24.

Conclusive presumptions, on the other hand, implicate not only the constitutional interest in reliability but also the defendant's interest in a nonjudicial factfinder. To the extent an instruction implicates only the interest in reliability, it may be assessed by the rule described above alone. But to the extent it implicates the interest in a nonjudicial factfinder, judicial assessment of the reliability of the conviction is beside the point. Juries are interposable as of right in part

because jurors as a group may be guided by common sense and community values to a degree not true of an individual judge. Hence, judges reviewing such cases

> are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.

Weiler v. United States, 323 U.S. 606, 611 (1945).

The reviewing court can ask, however, whether in light of all the evidence and circumstances of trial

there is any reasonable possibility the jury did not decide an essential issue. In understanding the jury's response to instructional ambiguity, as discussed heretofore, the evidence is important. It disrespects the essential rationality of jurors, their vital difference from judges, to assume they would ignore the evidence and leap automatically to constructions which would divert them from their factfinding mission.

Juries are inherently inclined to gauge guilt from facts. It is their special talent, their natural disposition, their raison d'etre. When the evidentiary or factfinding road is plain, the obscure instructional detour is less likely.

Thus, when the evidence of guilt is manifest, and the evidentiary issue was squarely put to the jury with the best force each party could muster, and the

possibility that the jury failed to find the facts pertinent to that issue is contingent on constructions of instructions which have plausibility mainly only in the abstract, there can be good cause to conclude there is no reasonable possibility the jury failed to decide the essential factual issue. See United States v. Frady, 456 U.S. at 171-74; People v. Whitt, 36 Cal.3d 724, 734-35 (1984); People v. Garcia, 36 Cal.3d 539, 554-56 (1984).

Circumstances apart from the evidence and the evidentiary posture of the case as it went to the jury also may justify a finding of harmless error when performance of the jury's factfinding function is in question. The evidentiary issue to which the instructional error relates may have been effectively conceded by the defense, or other instructions or findings may show the

jury necessarily did examine the issue, or the defendant may have been acquitted of the only charge to which the instructional ambiguity had significance. See Connecticut v. Johnson, 460 U.S. at 87; United States v. Frady, 456 U.S. at 171, 174; People v. Garcia, 36 Cal.3d at 554-56; People v. Whitt, 35 Cal.3d at 734-35.

Thus, the fact the defendant in this case challenges the presumptions herein only on the ground they unconstitutionally shifted the burden of proof, and not on the ground they stated a conclusive presumption or otherwise precluded the jury from considering essential issues, is significant to the harmless error analysis. Such a claim concedes the jury did examine the factual issue; it asserts, rather, that the jury decided the issue upon an improper standard of proof. It is an attack upon the

reliability of the conviction, not an assertion the jury was precluded from considering essential facts. As the constitutional value in question here is only the interest in accuracy, not the interest in a nonjudicial factfinder, the appropriate harmless error question is whether, in light of the entire record, there is reasonable cause to doubt the reliability of the verdict.

D.

Whether error justly may be found harmless necessarily does depend upon assessment of the unique circumstances of each case and the implications of the asserted error in light of those circumstances -- in short, upon the exercise of judgment.

That judgment will vary as the circumstances of the case vary is no impeachment of its propriety. Its "malleability" and "inconsistent . . .

results" may sometimes seem a "plague" and a "confusion," see Francis v. Franklin, 105 S.Ct. at 1975 n.8, but the consistency demanded by the Constitution is not that of regular reversal or affirmance, but of respect for basic constitutional principles. Just as we ordinarily assume juries will respect the instruction of judges, we also must ordinarily assume judges will respect the instruction of the Constitution. It cannot legitimately be supposed by this Court that the judges of the inferior courts hold constitutional values in any less consistent esteem than do the members of this Court.

The tests of harm suggested heretofore, we respectfully submit, are fully capable to insure protection of essential constitutional values in each individual case. The Chapman test, after all, was deliberately formulated with a view to

corralling courts hostile to Constitutional rule and to limiting "unfair and mischievous results." See Chapman v. California, 386 U.S. at 21-22, 50; Traynor, The Riddle of Harmless Error 43 (1970). Here, paradoxically, the burden of automatic reversal would fall most heavily not on those courts insensitive to constitutional rights, but on states and courts known already to be open to review and examination of such claims by their waiver of procedural default rules which otherwise would set the security of "prejudice" around convictions. Cf. Hankerson v. North Carolina, 432 U.S. at 244 n.8.

If "prejudice" properly may be demanded in a collateral proceeding when there was no objection to error, notwithstanding contentions that the error compelled the jury to presume malice and relieved the prosecution of its burden

of proof, United States v. Frady, 456 U.S. at 158, 167-70, 172, 174, why not in this collateral proceeding also? Does the circumstance that the defendant in this case belatedly raised the presumption issue in a motion for new trial, and the Tennessee courts willingly considered the contention on its merits on appeal, Brief in Opposition to Petition for Writ of Certiorari, at 8 n.1, so alter the constitutional assessment of justice that reversal must automatically be compelled? Why ought not the same test and requirement of prejudice apply here as there?

We invite the Court to consider any hundred cases and find one in which the risk of unjust conviction or of a material deprivation of jury factfinding will not have been discovered by the harmless error tests outlined above. It is one thing to free one hundred obviously guilty persons to safeguard a

single innocent, but when the single innocent is safe already, what is the point in freeing the guilty? There is a danger in the use of "mechanical formulas that tend to replace discriminating judgment" quite as severe as the danger that harmless error rules might swallow up substantial rights. "A rational test . . . must operate to preserve such rights even as it serves to screen out innocuous errors." Traynor, The Riddle of Harmless Error 19-20 (1970).

We return in our end to our beginning: the costs here are high and we urgently ask the Court to be sure, before adopting any rigid rule, that it is a genuine necessity. We submit it is not necessary here, and hence ask the Court not to retreat from its commitment to judgment.

CONCLUSION

We respectfully submit that the decision of the United States Court of Appeals for the Sixth Circuit should be reversed and the case remanded for determination of harm in accordance with the standards discussed above.

DATED: December 10, 1985.

Respectfully submitted,

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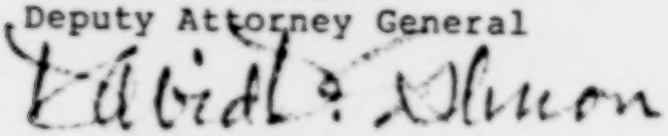

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No. 84-1974

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

JIMMY C. ROSE, WARDEN, PETITIONER

v.

STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether jury instructions creating a rebuttable presumption that the defendant killed with malice aforethought were harmless where (a) the evidence conclusively proved that the defendant killed both victims with malice aforethought, (b) the jury found that he also killed one victim willfully and with premeditation and deliberation on an intent to kill, and (c) the defenses he asserted—nonparticipation, insanity, amnesia, and voluntary intoxication—could not have been affected by the jury instructions on malice.

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W. LaFave & A. Scott, *Criminal Law* (1972) 28
R. Perkins & R. Boyce, *Criminal Law* (3d ed. 1982) 16
S. Rep. 98-225, 98th Cong., 1st Sess. (1983) 27
R. Traynor, *The Riddle of Harmless Error* (1970) .. 10
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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER

v.

STANLEY BARHAM CLARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented by this case is whether jury instructions creating a rebuttable presumption that the defendant killed with malice aforethought were harmless. The Court's resolution of this question will apply equally to state and federal prosecutions involving this and other types of errors that might be claimed to be reversible even in the absence of actual prejudice to the defense.

STATEMENT

1. a. On December 30, 1978, Joy Faulk and Charles Browning were shot to death by respondent Stanley Clark while they were sitting in Browning's pickup truck in a

remote area of Rutherford County, Tennessee. The killings stemmed from "a somewhat complicated domestic situation" (Pet. App. A24). Following her divorce from her husband Sam Faulk, Joy Faulk had a "stormy" relationship with respondent (*ibid.*). After they separated, Faulk became involved with Charles Browning. Respondent was angered by that relationship and threatened to kill Faulk if he learned that she was dating another man (*ibid.*; 3 Tr. 390-392, 395, 397, 422-423, 438-439; 4 Tr. 461-462, 508, 512).

On the night of December 30, Joy Faulk, Charles Browning, and Joy's two children were driving in Browning's truck in a remote area of the county. Respondent pursued them in his truck, and, when Browning pulled into a driveway to let respondent pass, respondent stopped his truck behind Browning's, blocking any escape. After moving to virtually point-blank range of both victims, respondent, using a pistol that he had borrowed from a friend, shot Faulk three times, twice in the head and once in the left rear shoulder, and shot Browning once in the head. Pet. App. A2-A3, A8-A10, A24-A25.

b. Respondent did not testify at trial. His chief defense, presented through cross-examination of the State's witnesses, was that Sam Faulk, Joy's Faulk's ex-husband, had murdered Joy Faulk and Browning. Sam Faulk's motive, respondent argued, was retaliation for a child custody suit that Joy Faulk had filed against him, which stemmed from an incident in which he was alleged to have molested his daughter Mitzi (Pet. App. A24-A25, A32-A33; 1 Tr. 18-23; 2 Tr. 234-235; 4 Tr. 464-466; 5 Tr. 670-671, 686-689; see generally 8 Tr. 1009-1051 (defense closing argument)).[1] Respondent also presented evidence

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[1] That defense was based upon a rumor at large in the county (4 Tr. 464-466). In truth, however, Mitzi simply had a urinary tract infection (3 Tr. 458-459). Moreover, several eyewitnesses testified for the State that Sam Faulk had spent the entire evening at a local bar and was there at the time that Joy Faulk and Browning

in support of three other partially inconsistent defenses: insanity, amnesia, and voluntary intoxication (Pet. App. A5, A17-A20, A39). The evidence of these defenses was introduced chiefly through the testimony of two defense psychiatrists, although respondent also elicited testimony to support these claims on cross-examination of prosecution witnesses (*id.* at A17-A19, A39; J.A. 141; 7 Tr. 879-887).[2]

c. At the close of trial, the trial judge charged the jury that all homicides are presumed to be malicious in the absence of evidence rebutting the presumption (J.A. 185, 187; 8 Tr. 1084-1087) and that the use of a deadly weapon in a manner likely to cause death also gives rise to a presumption of malice (J.A. 187-188; 8 Tr. 1087-1089).[3] The jury was also instructed that (i) insanity was a complete defense to any of the charges, but the jury should consider this defense only if it first found all of the elements of the charged offenses to have been proven (J.A. 190; 8 Tr. 1091-1092); (ii) alibi was a complete defense to all of the charges (8 Tr. 1095-1096); (iii) voluntary intoxication may negate the State's proof of willfulness, premeditation, and deliberation and therefore was a defense to first degree murder, but voluntary intoxication was not a defense to second degree murder or any other lesser included offense (J.A. 193-195; 8 Tr. 1097-1098); (iv) amnesia by itself was not a defense to any of the charges (J.A. 195; 8 Tr. 1098). Respondent was convicted of first degree murder in the killing of

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were killed. See 4 Tr. 482, 582-584; 5 Tr. 594, 638-639, 642-644, 645-646, 654-657, 713-716.

[2] The only other defense witness was the police radio dispatcher who received a telephone call on the night in question informing him that there had been a shooting. 7 Tr. 888-901.

[3] Respondent did not object to the instructions on malice at trial. Pet. App. A10 n.6; see R. 106-120 (proposed defense jury instructions); 8 Tr. 1104 (defense objections to trial court's jury charge).

Faulk and second degree murder with respect to Browning.

2. On appeal, respondent argued that the jury instructions on malice were invalid under *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). The Tennessee Court of Criminal Appeals rejected respondent's argument on the ground that the instructions, read as a whole, did not shift the burden of proof to him on this element of the offense (Pet. App. A37-A39). The court also held that the jury charges did not require reversal because respondent's defenses of nonparticipation and insanity raised no issue regarding whether the killings were done with malice and therefore were not affected by the instructions (*id.* at A39). The Tennessee Supreme Court thereafter denied respondent's application for leave to appeal (*id.* at A40).

3. Respondent later filed a petition for a writ of habeas corpus, raising this claim and others. The district court held that the instructions created a rebuttable presumption of malice and were therefore invalid under *Sandstrom* (Pet. App. A10-A15). The court also held that the error in giving these instructions was not harmless because respondent's defense at trial, in part, was that he lacked an intent to kill because of intoxication at the time of the offense, amnesia, and mental illness, and these defenses were supported by some evidence (*id.* at A15-A20). The court did not inquire, however, whether and how the jury was instructed on these defenses or whether they were valid state-law defenses to malice.

4. The court of appeals affirmed (Pet. App. A1-A6). It agreed with the district court that the jury instructions in this case were erroneous (*id.* at A3-A4), and, while it noted that such errors can be harmless (*id.* at A4-A6), it found that the instructions in this case were prejudicial, because part of petitioner's defense was that he lacked the requisite mens rea for murder (*id.* at A6).

SUMMARY OF ARGUMENT

A. It is axiomatic that appellate courts must ordinarily disregard errors occurring at trial that could not have had a material affect on the verdict. The few exceptions to the harmless error principle involve either violations so basic that they deprive the defendant of the essentials of a trial (such as denial of counsel or lack of an impartial fact-finder) or errors that are both likely to be prejudicial and so difficult to assess specifically that no reliable harmless error inquiry is practical. While at bottom the fault in erroneous presumption instructions is that they impact on the defendant's right to have his guilt determined by the jury, the instructions cannot rationally be deemed the functional equivalent of a denial of a jury trial. Beyond that, the instructions on malice given here were used in countless numbers of criminal trials since the early common law and thus cannot be deemed so inherently subversive of due process that their use amounts to the denial of any trial at all.

It also cannot be said that an erroneous instruction on a presumption will so invariably prejudice the accused in undetectable ways that undertaking a case-by-case inquiry into their prejudicial effect is futile. *United States* v. *Frady*, 456 U.S. 152 (1982), held that similar jury instructions were not prejudicial in every case in which they are used and that a court can look to the evidence adduced at trial, the defenses (if any) asserted by the accused, and the jury's findings as revealed by its verdict in order to determine whether the instruction was prejudicial. The lower courts have also generally held that a case-by-case determination of prejudice due to an erroneous presumption instruction is feasible.

B. The record shows that respondent was not prejudiced by the instructions on malice. The nature of the crime itself—multiple gun shots to the head at point blank range—virtually forecloses any conclusion that malice was absent. Moreover, the jury found that respondent murdered one of his victims willfully and with premeditation and deliberation on an intent to kill. It

is inconceivable that any jury that made those findings would not also have found under proper instructions that respondent killed with malice. Finally, the court's instructions on malice were irrelevant to respondent's defenses at trial. Respondent's alibi defense did not call into question the degree of culpability, but instead involved a total denial of participation. The jury was told not to consider his insanity claim unless and until the jury found that he was guilty of the charged offenses. Finally, neither amnesia nor intoxication would negate malice under the jury instructions given at respondent's trial or under Tennessee law. This case is controlled by *Frady*, in which the Court found that the defendant was not prejudiced by similar instructions on malice.

ARGUMENT

THE ERRONEOUS JURY INSTRUCTIONS IN THIS CASE DO NOT JUSTIFY SETTING ASIDE RESPONDENT'S CONVICTIONS

A. There Are Few Kinds Of Trial Error That Automatically Invalidate A Conviction Regardless Of The Likelihood Of Prejudice In The Circumstances Of The Particular Case

1. The trial of a criminal case can be an extremely complex undertaking. The examination of prospective jurors must be sufficiently comprehensive to allow the parties an opportunity to discover bias, but not so prolonged as to delay the start of trial for an undue period. Every question asked of a witness and every document offered into evidence could potentially raise issues implicating principles of evidence that took Dean Wigmore ten volumes to explain. The comments by the trial judge on the evidence must not prejudice the jury against the accused. The extemporaneous arguments of counsel may mistakenly offend principles that would have been respected if counsel had had greater time to research and prepare. The trial court's charge to the jury, even when

aided by standardized jury instructions, must draw upon the legal rules laid down in scores of decisions by this Court and others. At any stage during a trial—particularly a jury trial—errors may be made. And the likelihood of an error occurring increases as new decisions from this Court and others establish different rules for the trial courts to implement or refine already-established principles.[4]

Correcting every error that occurs before or during a criminal trial by ordering a new trial is also a costly balm.[5] New trials consume scarce judicial resources and introduce additional delays into the administration of justice for all participants. If a trial judge compensates by taking on an increased case load, that may require a sacrifice of legal study and thereby increase the risk of mistake in every case that the judge tries. New trials are equally costly to the prosecutor: the trials of other defendants may have to be postponed or foregone altogether, or the prosecutor may be forced to agree to plea bargains that would be unacceptable were adequate resources available for trial. Witnesses are compelled to relive painful, and sometimes harrowing, experiences, thereby deterring voluntary cooperation with the criminal justice system and making the victims of crime also victims of that system.[6]

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[4] *Sandstrom* itself illustrates this fact. There, the Court held that a jury may not be given an instruction stating a principle known to the criminal law since the days of Coke and Blackstone and given in untold numbers of state and federal criminal trials. See pages 16-17, *infra*.

[5] See, *e.g.*, *Luce* v. *United States*, No. 83-912 (Dec. 10, 1984), slip op. 4; *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 553-555 (1984); *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983); *Kotteakos* v. *United States*, 328 U.S. 750 (1946); cf. *Flanagan* v. *United States*, 465 U.S. 259, 264-265 (1984); *Morris* v. *Slappy*, 461 U.S. 1, 11, 14-15 (1983); *Engle* v. *Isaac*, 456 U.S. 107, 126-129 (1982).

[6] For instance, a retrial of this case would force Joy Faulk's daughter Mitzi to relive the slaying of her mother, an undeniably traumatic experience.

Retrials also jeopardize the reliability of trial outcomes. Indeed, it is a truism that the passage of time may render a retrial infeasible, or sometimes impossible, because the memories of witnesses may fade, witnesses may decline to testify, they may move or die, and evidence may become lost. The community's moral and psychological interest in the swift administration of justice also suffers, as does society's interest in the incapacitation and rehabilitation of guilty offenders and the deterrence of future ones. If a defendant accused of a serious crime is free on bail, delay in bringing a criminal prosecution to a close prolongs public anxiety over community safety and increases the risk that the accused may commit new crimes while at large. Defendants, both guilty and innocent, also suffer if their trials are postponed in order to accommodate other defendants' retrials, perhaps by impairing their ability to demonstrate their innocence or by disrupting their personal lives, a burden that is particularly onerous for those defendants who are in custody while awaiting trial. Even where a new trial rectifies the error that occurred in the first one, there is always the risk that new and different errors will take their place. Finally, these costs are enhanced when a conviction is set aside on collateral attack, rather than on direct appeal.[7] These factors make an unnecessary second trial, even if free of error, wholly undesirable.

Of course, if the defendant has fallen victim to an error that created a material risk of a faulty verdict against him, the conviction cannot be allowed to stand. But because new trials are costly in so many ways, the Court has repeatedly held that a defendant is entitled to a fair trial, but not a perfect one, and that the reversal of a

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[7] See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 164-166 (1982); *Engle* v. *Isaac*, 456 U.S. at 126-129 & nn. 31-34; *Sumner* v. *Mata*, 449 U.S. 539, 550 & n.3 (1981); *United States* v. *Addonizio*, 442 U.S. 178, 184-185 & n.11 (1979); *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-150 (1970).

conviction bestows an unjustified windfall on a defendant where there is no realistic likelihood that the error skewed the factfinding process at trial or rendered the proceedings fundamentally unfair. See, *e.g.*, *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15 & n.14; *Rushen* v. *Spain*, 464 U.S. 114, 118 (1983); *United States* v. *Hasting*, 461 U.S. 499, 509 (1983); *Hamling* v. *United States*, 418 U.S. 87, 134-135 (1974). In fact, the Court has made clear that "it is the *duty* of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless" (*Hasting*, 461 U.S. at 509 (emphasis added)). It is also firmly settled law that even constitutional errors must be disregarded if satisfactorily shown to be harmless. See *Chapman* v. *California*, 386 U.S. 18 (1967).[8] By requiring an appellate court to disregard errors that did not materially affect the outcome of the trial, the harmless error doctrine serves obvious and salutary interests in the administration of criminal justice.[9] At bottom, by recognizing that

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[8] See also, *e.g.*, *Rushen* v. *Spain*, *supra* (right to be present at trial); *United States* v. *Hasting*, *supra* (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper* v. *Evans*, 456 U.S. 605, 613-614 (1982) (statute improperly forbidding court from giving a jury instruction on a lesser included offense in a capital case, in violation of the Fourteenth Amendment Due Process Clause); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of identification in violation of the Sixth Amendment Counsel Clause); *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (admission of out-of-court statement in violation of the Sixth Amendment Confrontation Clause); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (admission of confession in violation of the Sixth Amendment Counsel Clause); *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (denial of right to counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

[9] By focusing attention on the underlying fairness of the trial, rather than on immaterial technicalities, it reinforces the principle that the basic purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence (see *United*

"justice, though due to the accused, is due to the accuser also," the harmless error doctrine allows an appellate court "to keep the balance true" (*Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934)) between society's interest in convicting the guilty and the defendant's interest in avoiding an unjust conviction. See *Hasting*, 461 U.S. at 509.

2. Given the salutary purposes served by the harmless error doctrine and the modern day proliferation of constitutional rules governing criminal procedure, it is hardly surprising that the Court has found that most constitutional errors can be harmless. *Hasting*, 461 U.S. at 509. At the same time, however, the Court has also recognized that there is a small class of constitutional errors that are so intrinsically inconsistent with the rudiments of due process or inherently prejudicial that reversal of a defendant's conviction is necessary whenever such infractions occur. See *Chapman*, 386 U.S. at 23 n.8. The nature of each of these errors is defined in a

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States v. *Nobles*, 422 U.S. 225, 230 (1975)), and not simply to provide the factual basis for an appellate exposition of abstract legal principles that do not affect the disposition of the case at hand (cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977)). By removing incentives for defense counsel to plant technical errors in the record for the sole purpose of obtaining a reversal on appeal, the harmless error doctrine not only eliminates matters that are immaterial to the underlying fairness of the trial, but also fosters the public respect for the legal process that is essential if self-help is to be avoided, by proving that the victims of crime can rely upon the criminal process to vindicate their injuries. See *Hasting*, 461 U.S. at 507, 509; *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Kotteakos* v. *United States*, 328 U.S. 750, 759-760 (1946); R. Traynor, *The Riddle of Harmless Error* 14, 50 (1970); cf. *Morris* v. *Slappy*, 461 U.S. at 14-15. By contributing to finality, the harmless error doctrine protects society's interests in retribution, incapacitation, deterrence, and rehabilitation. Cf. *Engle* v. *Isaac*, 456 U.S. at 127 & n.32; *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting). Finally, by eliminating burdensome and needless retrials, it conserves scarce resources and averts the risk that a retrial may cause new errors. See *Hasting*, 461 U.S. at 509.

way that makes it unacceptable, meaningless, or impractical to apply the harmless error doctrine to them.

The first and most obvious category of such errors are those that effectively deprive the defendant of what could meaningfully be considered a trial at all. The existence of that category follows from the basic due process principle that the government may not punish a person "prior to an adjudication of guilt in accordance with due process of law" (*Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979) (footnote omitted)). *Chapman* identified two such errors: forcing a defendant to stand trial before a trier of fact with a financial interest in the outcome (see *Tumey* v. *Ohio*, 273 U.S. 510 (1927)) and denying a defendant the assistance of counsel at trial (see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)). Cf. *Drope* v. *Missouri*, 420 U.S. 162 (1975) (compelling a mentally-incompetent defendant to stand trial); *Moore* v. *Dempsey*, 261 U.S. 86, 89 (1923) (mob dominated trial). Since the two essential components of the modern concept of a fair trial are a neutral and unbiased decisionmaker and the assistance of an attorney, these errors effectively deny a defendant any realistic opportunity for a fair trial as we know it. See *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 4-11; *Engle* v. *Isaac*, 456 U.S. 107, 134 (1982); *United States* v. *Ash*, 413 U.S. 300, 307-308 (1973). Accordingly, errors such as these, by definition, cannot be excused on the ground that the defendant received a fair trial despite the error. A similar analysis would suggest that depriving a defendant of a jury trial when he is entitled to one could never be harmless even if the bench trial he received was otherwise fair and reliable.

Another type of nonharmless error is one that is both likely by its nature to be damaging, yet at the same time of such a character that reliable measurement of the actual damage in any given case is almost always impos-

sible or highly impractical.[10] Few cases indeed fit into this category. *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), is one example; there, the Court ruled that defense counsel's timely objection to compulsory representation of co-defendants with conflicting interests was presumptively prejudicial. This type of error, *Holloway* explained, necessarily undermines an appellate court's confidence in the accuracy of the verdict because the error is likely to affect the outcome in every case in a manner that is not susceptible to effective appellate review. See 435 U.S. at 490-491.

A third category of errors inherently fatal to a conviction consists of those claims as to which prejudice is itself already an element in establishing the occurrence of a constitutional violation. See, *e.g.*, *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 10-15 (*Brady* claims); *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 21-26 (ineffective assistance of counsel); *United States* v. *MacDonald*, 435 U.S. 850, 858 (1978) (speedy trial claims);[11] cf. *United States* v. *Young*, slip op. 15 n.14 (plain error under Fed. R. Crim. P. 52(b)). Claims such as these are not subject to a harmless error analysis because it is pointless to inquire whether an

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[10] In Justice Harlan's words, "particular types of error have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless." *Chapman*, 386 U.S. at 52 n.7 (dissenting). *Chapman* noted that the receipt of a coerced confession fits into this category (see *Payne* v. *Arkansas*, 356 U.S. 560 (1958)). However, the Court's later decisions in *Harrington* v. *California*, 395 U.S. 250 (1969), and *Milton* v. *Wainwright*, *supra*, have called into question whether the admission of a coerced confession fits into this class of errors.

[11] A showing of prejudice is not an absolute prerequisite to establishing a speedy trial violation. See *Moore* v. *Arizona*, 414 U.S. 25 (1973); *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972). But consideration of prejudice nonetheless plays a major role in assessing such a claim. See *MacDonald*, 435 U.S. at 858. For that reason, this too is a category of cases in which it is fair to say that the harmless error principle has in effect been folded into the decision whether there was an error at all.

error affected the outcome of the trial if the defendant has already shown that the error was prejudicial in proving its existence.[12]

B. Errors Of The Kind That Occurred In This Case Have None Of The Attributes That Support Automatic Reversal

In *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), a plurality of the Court suggested that an instruction stating a conclusive presumption with respect to an unconceded element of the offense cannot be harmless because it amounts to a prohibited directed verdict of guilty. 460 U.S. at 84-87.[13] *Sandstrom*, 442 U.S. at 517-519, and *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 5-17, did not decide whether instructions containing a conclusive or a rebuttable presumption could be harmless, but both cases held that such instructions are invalid because they can either lessen the government's burden of proof or unconstitutionally shift the burden of proof to the accused. In addition, *Francis* found that the rebuttable presumption employed in that case—that the accused was presumed to have killed with malice—was not harmless because it " 'completely eliminated' " his defense that the killing was accidental. Slip op. 18 (citation omitted). While those points explain the flaws that make an instruc-

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[12] In his dissent in *Chapman*, Justice Harlan suggested a fourth category that would include certain types of official misconduct that might warrant reversal in every case to demonstrate society's intolerance for intentional misbehavior. 386 U.S. at 52 n.7. However, *Hasting* clearly rejected any such theory, holding instead that "the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise * * * prosecutorial overreaching." 461 U.S. at 507; cf. *Mabry* v. *Johnson*, No. 83-328 (June 11, 1984), slip op. 6; *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982).

[13] The plurality left open a possible exception for cases in which the defendant essentially concedes the issue in dispute, as where a defendant concedes the issue of intent by raising an alibi or insanity defense. 460 U.S. at 87.

tion of the kind given here constitutionally unacceptable—and perhaps demonstrate that such an error is likely often to be prejudicial—they do not establish a valid basis for classifying *Sandstrom* errors as inherently prejudicial.

1. *An Instruction Containing An Impermissible Presumption Is Not Invariably The Functional Equivalent Of A Directed Verdict Of Guilty*

If a trial court directs the jury to return a verdict of guilty, the error in doing so is in every case the functional equivalent of the outright denial of a jury trial. In such a case, concededly, reversal could not be avoided by showing that the trial was in all other respects fair and the judge's verdict fully reliable. The court's action would so far have deprived the defendant of an indispensable element of a trial that the outcome could not be allowed to stand. But this observation does not mean that, because a vice of a *Sandstrom* instruction is its tendency to preempt the jury's full consideration of an element of the offense, it is always and necessarily to be equated with an actual directed verdict. Whether that is an apt equation depends instead on the circumstances of the individual case: sometimes the likely impact will be grave enough that it is reasonable to say that the defendant's right to have his guilt determined by the jury has been defeated, but sometimes that will not be so. The situation is analogous to an infringement of the right to counsel: a total deprivation, like a directed verdict, always requires reversal; a partial deprivation, in the form of ineffective assistance, may or may not call for a new trial, depending on the reviewing court's assessment of its likely impact on the outcome of the trial.

This case illustrates our proposition. It is clear that the state trial judge did not enter a directed verdict of guilty in the true sense of that term. The judge expressly told the jury that it was to choose one of six separate verdicts for each of the two killings, including a verdict of not guilty (J.A. 181-182, 184; 8 Tr. 1075-7076, 1083-

1084). Accordingly, respondent was not deprived of his right to a jury trial unless the trial court's instructions effectively foreclosed the jury from finding in his favor on any of the charged offenses.

Properly viewed, the jury instructions on malice given here were not tantamount to a directed verdict even on that element of murder, let alone any of the other elements. The jury was not directed to find that respondent had acted with malice, or that the State had proven that respondent had acted with malice, or that malice was not an issue for their consideration. Nor did the instructions convey that impression to the jury; on the contrary, the trial court repeatedly told the jury that the State had to prove every element of the charged offenses beyond a reasonable doubt.[14] While the jury was told that malice was to be "presumed" (J.A. 185, 187-188; 8 Tr. 1087-1088), the jury was never instructed that this presumption was "conclusive"; on the contrary, the jury was instructed that the presumption "may be rebutted" (J.A. 185, 187; 8 Tr. 1084-1085, 1087-1088). "Given the common definition of [rebut]" (*Sandstrom*, 442 U.S. at 517) as "to drive or beat back[,] * * * to contradict or oppose by formal legal argument, plea, or countervailing proof[,] * * * to expose the falsity of[,] * * * [or] to make or furnish an answer or counter proof" (*Webster's New Collegiate Dictionary* 956 (1981)), no reasonable juror would naturally have construed the instructions on malice as conclusive. And neither the district court, the court of appeals, nor respondent has identified anything else at trial that would have led the jury to adopt that conclusion. Accordingly, because "[a] mandatory rebuttable presumption does not remove the presumed element from the case" (*Francis*, slip op. 9), the instructions on malice given here cannot be deemed to be the equivalent of a directed verdict on this element of the offense.

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[14] J.A. 182, 183 (twice); *id.* at 184, 186 (thrice); *id.* at 187, 188, 189, 190 (thrice); *id.* at 195; 8 Tr. 1076, 1078, 1081, 1084, 1086 (twice); *id.* at 1088-1089, 1090-1091, 1095-1096, 1097, 1098, 1099, 1100-1101; see *id.* at 1091-1092, 1094-1095.

The plurality in *Connecticut* v. *Johnson* appears to suggest (460 U.S. at 85-86) that, because the vice of an improper presumption is that it may have caused the jury to find the presumed fact without actually weighing the evidence, it is illegimate for a reviewing court to determine the effect of the instruction on the jury's findings regarding the factual elements of the offense. But we fail to see a qualitative difference between this and other kinds of trial errors that are subject to a harmless error analysis. Leaving aside exclusionary rules, what makes a ruling an "error" is its potential to distort the jury's consideration of the facts and its application of the law to those facts. Unless the distortion produced by the error transforms the proceedings into something wholly inadequate and effectively eliminates the jury's role as fact-finder, a reviewing court can and should ask whether the error may with sufficient confidence be found not to have affected the verdict in the circumstances of the case before it.[15]

History also strongly militates against the conclusion that an improper presumption denies a defendant the essence of a trial. The instructions on malice given in this case stated principles of the law of homicide that had their roots in the common law as expounded by Coke and Blackstone (R. Perkins & R. Boyce, *Criminal Law* 75-78 (3d ed. 1982)) and that had been given in criminal trials in state and federal courts countless times prior to the decision in *Sandstrom*. This Court itself had noted that "at common law, men are presumed to intend the nat-

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[15] True, it is never certain that the jury would not, in the absence of the offending instruction, have reached an irrational verdict. But a reviewing court is not generally obliged to defer to such a possibility. The Court made this precise point in *Strickland* v. *Washington*, *supra*, explaining that "[a]n assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like," since "[a] defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." Slip op. 24.

ural consequences of their act and cannot escape punishment for taking life on the claim that they had not intended or expected that such consequence would result from what they purposely did." *Pico* v. *United States*, 228 U.S. 225, 231 (1913). In fact, the Court had upheld a jury instruction voicing, as the Court put it, "nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act." *Allen* v. *United States*, 164 U.S. 492, 496 (1896). It is quite dubious that jury instructions with this pedigree are so invariably prejudicial and so offensive to due process principles that they rendered literally thousands of trials over more than two centuries of Anglo-American common law a virtual nullity.[16]

2. *Jury Instructions Like Those Given Here Are Not So Likely To Be Prejudicial That A Harmless Error Inquiry Is Futile*

The problems caused by improper presumptions are twofold: they may have induced the jury to rely upon the presumption rather than the evidence in finding that respondent was guilty, or they may have led the jury to believe that respondent had the burden of disproving malice. *Francis*, slip op. 9-11. The issue then is whether the verdict can be upheld given the uncertainty created by these instructions. *Id.* at 14-15 n.8. Of course, every error that occurs at trial raises some conceivable doubt whether it influenced the jury, but the harmless

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[16] Cf. *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) (upholding state law placing burden of persuasion on accused on affirmative defenses; "[t]his was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified"); *Barnes* v. *United States*, 412 U.S. 837, 843 (1973) (instruction that the jury may infer guilty knowledge from the unexplained possession of stolen goods states "a traditional common-law inference deeply rooted in our law").

error doctrine requires a court to disregard those errors that it can say with sufficient confidence did not materially contribute to the verdict. Whether that doctrine can apply in a given case will turn upon the likelihood that an error affected the verdict and the degree of uncertainty that the criminal justice system is willing to accept. The category of errors is small in which that inquiry is altogether foreclosed because they are invariably prejudicial or their impact is impossible to assess. See *United States* v. *Cronic*, slip op. 10-13.

Francis suggested, but did not hold, that the inherent uncertainty stemming from an unconstitutional presumption might be too great for the criminal justice system to accept. Slip op. 14-15 n.8, citing *Stromberg* v. *California*, 283 U.S. 359 (1931). *Stromberg* held that an instruction allowing the jury to convict the accused for engaging in activities that were protected by the First Amendment was unconstitutional, notwithstanding the possibility that the jury could have rested its verdict upon an alternative and constitutionally unobjectionable basis. See 283 U.S. at 367-370. There are, of course, no First Amendment principles implicated by this case, and the need to avoid punishing protected speech is thus wholly absent here. Instead, the question is whether the possibility that the jury may have relied upon an unlawful presumption is too great for the criminal justice system to accept, regardless of the sufficiency of the proof of the defendant's guilt, the nature and sufficiency of the defenses that he asserted at trial, and the factual findings underlying the jury's verdict.

In contrast to the suggestion in the *Francis* footnote stands the holding in *United States* v. *Frady*, 456 U.S. 152 (1982), which makes clear that this question cannot be given a categorical answer and must be resolved by looking to the facts of each case. In *Frady*, the defendant contended that he was denied a fair trial by the use of jury instructions on malice that were not materially different from those given here. See 456 U.S. at 158 & n.7. Because the defendant did not object to the instructions

at his trial, the Court held that he was required to prove, inter alia, that he had been prejudiced by their use in his case. In so ruling, the Court expressly rejected his claim that "an error in the instructions concerning an element of the crime charged amounts to prejudice *per se*, regardless of the particular circumstances of the individual case" (*id.* at 170). Instead, the Court held that a defendant must "shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *Ibid.* (emphasis in original). Finding that the proof of malice was overwhelming and had not been controverted by the defendant's alibi defense, the Court held that he had not been prejudiced by the instructions, a conclusion also supported by the jury's finding that the murder was premeditated and deliberate. *Id.* at 171-174. *Frady* therefore forecloses the conclusion that erroneous instructions on malice are not subject to a harmless error analysis.[17]

Frady does not stand alone. The Court has found that a variety of different errors of similar dimension in jury instructions do not automatically require the judgment to be set aside. See *Zant* v. *Stephens*, 462 U.S. 862 (1983) (jury instruction based on unconstitutionally vague aggravating factor at a capital sentencing hearing does not invariably require reversal); *Kentucky* v. *Whorton*, 441 U.S. 786 (1979) (failure to give a jury instruction on the presumption of innocence does not invariably require reversal); *Henderson* v. *Kibbe*, 431 U.S. 145 (1977) (failure to instruct jury on causation is not always prejudicial); *Anderson* v. *United States*, 417 U.S. 211, 227-228

[17] To be sure, in *Frady* the defendant was required to carry the burden of showing prejudice on account of his procedural default, whereas the question here is whether the prosecution is to be permitted to take up the burden of showing the absence of prejudice beyond a reasonable doubt. The pertinent point about *Frady*, of course, is not the burden of persuasion but the Court's recognition of the feasibility of the inquiry.

(1974) (failure to instruct on an essential element of the offense is not plain error where the verdict shows that the jury would have found that element of the offense had it been properly charged); cf. *Barclay* v. *Florida*, 463 U.S. 939 (1983) (sentencing judge's reliance upon an aggravating factor that is invalid under state law does not require capital sentence to be vacated).[18]

The experience of the lower courts reinforces this Court's ruling in *Frady* that an erroneous jury instruction on malice will not so frequently affect the outcome of a trial that a case-by-case determination of the actual effect that the charge may have had is unwarranted. The nearly unanimous opinion of the federal courts of appeals is that this question can generally be addressed without

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[18] Other decisions by the Court (in cases that did not present this issue) have also involved factual situations in which it could be said with complete assurance that no reasonable juror could have failed to conclude that the defendant acted with malice. For example, could there be any doubt that Timothy McCorquodale, whose crimes were twice described by this Court as a "horrifying torture-murder" (*Gregg* v. *Georgia*, 428 U.S. at 201 (footnote omitted) (opinion of Stewart, Powell, and Stevens, JJ.); *Godfrey* v. *Georgia*, 446 U.S. 420, 429-430 (1980) (plurality opinion)), acted with malice aforethought? (In fact, the Eleventh Circuit found that jury instructions like those given here were harmless in McCorquodale's case: *McCorquodale* v. *Balkcom*, 705 F.2d 1553, 1555-1556, adopted in pertinent part, 721 F.2d 1493, 1502 (11th Cir. 1983) (en banc), cert. denied, 466 U.S. 954 (1984)). See also *Baldwin* v. *Alabama*, No. 84-5743 (June 17, 1985), slip op. 2 (over a 40-hour period, victim was brutalized, choked, repeatedly stabbed, run over by a car, and had her throat cut with a hatchet); *Wainwright* v. *Goode*, 464 U.S. 78, 79-80 (1983) (defendant strangled ten-year old boy with a belt; at trial, defendant "testified in graphic detail as to the circumstances of the killing" and stated that "he was 'extremely proud' of having murdered [the victim] 'for the fun of it'"); *Hopper* v. *Evans*, 456 U.S. 605, 606-607, 612-613 (1982). Tennessee has also had its share of such homicides. See, *e.g.*, *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 1-2 (robbery victim hanged); *State* v. *Matson*, 666 S.W.2d 41 (Tenn. 1984) (victim murdered to prevent him from identifying defendant).

undue difficulty. The First, Second, Fourth, Fifth, Sixth, Ninth, Eleventh, and District of Columbia Circuits have held that jury instructions of this type can be harmless where the evidence conclusively proves the issue in dispute and the defense raised by the accused does not contest that issue, or where other findings by the jury eliminate any uncertainty that the jury would have found the element in dispute. Although the Eighth Circuit has held that an instruction of this type ordinarily is presumptively prejudicial, even that court would be likely to find that the instructions in this case were harmless, since the jury's first degree murder verdict eliminates any uncertainty caused by the instructions on malice.[19] See pages 23-24, *infra*. Most state courts to consider the question have also found that these instructions can be harmless. The lower court cases are collected in an appendix to this brief.

C. Respondent Was Not Prejudiced By The Instructions On Malice That Were Given In His Case

The remaining inquiry is whether respondent was actually prejudiced by the trial court's instructions on malice in his case. The principles governing review of a claim that jury instructions denied the accused a fair trial are well settled. First, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); see also *Francis*, slip op. 11; *Whorton*, 441 U.S. at 788-789; *Kibbe*, 431 U.S. at 153-156; *United States* v. *Park*, 421 U.S. 658, 674-676 (1975). Moreover, because "the process of instruction itself is but one of several components of the trial which may result in [a] judgment of conviction" (*Cupp*, 414

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[19] See *Redding* v. *Benson*, 739 F.2d 1360, 1363-1365 (8th Cir. 1984), cert. denied, No. 84-5908 (Feb. 19, 1985) (failure to instruct the jury on essential element of the offense is harmless where the jury necessarily found that element nonetheless because of other instructions).

U.S. at 147), even on direct appeal a court must "view the [jury] charge itself as part of the whole trial" (*Park*, 421 U.S. at 674). The issue in a collateral proceeding, such as this one, is " 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' * * * not merely whether 'the instruction is undesirable, erroneous, or even "universally condemned."' " *Kibbe*, 431 U.S. at 154 (citation omitted); *Cupp*, 414 U.S. at 146-147. When the record of respondent's trial is realistically appraised, there can be no serious doubt that he was not substantially prejudiced by the instructions on malice.

1. An appropriate starting point is to compare the jury instructions given at respondent's trial with others on the same subject that would have been unobjectionable. Cf. *Zant*, 462 U.S. at 888; *Kibbe*, 431 U.S. at 154-157. For example, the trial court could have told the jury that (1) it may consider that the killings had been accomplished by the use of a deadly weapon in deciding whether the State had proved malice, and (2) it may consider all of the surrounding circumstances in determining whether respondent acted with malice. Given the evidence at respondent's trial, it is virtually certain—indeed, the jury's first degree murder verdict makes it absolutely certain—that the jury would have found that he acted with malice even if these jury instructions had been given in lieu of the ones that were actually used.

In this case, the evidence of malice was little short of overwhelming; to borrow a phrase from *Frady*, the evidence at trial showed that there was " 'malice aplenty' " (456 U.S. at 171 (citation omitted)). Two weeks before the night in question, respondent borrowed the murder weapon from a friend, using the ruse that his own revolver had been stolen. On the night of the slayings, respondent followed Faulk and Browning to a remote location at which, by deftly positioning his own car, he prevented their escape. At that point, and in full view of Faulk's two children, respondent shot Faulk and Browning in the head at point-blank range. Indeed, it is

fair to say that the State's proof in this case was, as in *Frady*, virtually conclusive on this issue. Compare pages 1-2, *supra*, with 456 U.S. at 171-172. Accordingly, even if a misstatement of the law is more likely to be prejudicial than an incomplete statement or an omission (*Kibbe*, 431 U.S. at 155), in this case the likelihood that a properly instructed jury would have found that respondent acted without malice is virtually nil.

For that reason, this case bears no resemblance to *Francis*. There, the defendant, while attempting to escape from custody, knocked on the door of a nearby home and demanded the resident's car keys. As the occupant slammed the door, Franklin's gun discharged, killing the occupant. Franklin's sole defense at trial was that the occupant was killed as the result of an accidental response to the slamming of the door, a defense supported by his treatment of everyone else he came across during his attempted escape. Slip op. 1-3. This Court upheld the court of appeals' finding that an erroneous instruction on malice was not harmless because " '[Franklin's] defense was that he did not have the requisite intent to kill' " and " '[t]he facts did not overwhelmingly preclude that defense' " (*id.* at 17-18 (citation omitted)). The Court also found additional support for that conclusion in the fact that the jury had asked the trial court to be reinstructed on the elements of malice and on Franklin's accident defense. *Id.* at 18. None of those factors is present here.

2. Moreover, the jury found respondent guilty of the first degree murder of Faulk, and neither the district court nor the the court of appeals found any error in the instructions on the additional *mens rea* components constituting that offense. Under the instructions on first degree murder given at respondent's trial, the verdict shows that the jury found that he had acted willfully and with premeditation and deliberation on an intent to kill.[20] Given the evidence of respondent's preparation for

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[20] The trial court instructed the jury as follows: (J.A. 184-185; 8 Tr. 1084-1085): "For you to find the Defendant guilty of murder

the crimes and the manner in which they were carried out, it is inconceivable that the jury that found that he acted willfully and with premediation and deliberation, would, if correctly instructed, have failed to find malice,[21] and neither the district court, the court of appeals, nor respondent has offered any plausible basis for so concluding. See *Frady*, 456 U.S. at 169-174; *United States* v. *Green*, 424 F.2d 912, 913 (D.C. Cir. 1970); *Belton v. United States*, 382 F.2d 150, 155 (D.C. Cir. 1967); cf. *Kibbe*, 431 U.S. at 156 ("the jury's determination that the respondent acted recklessly necessarily included a determination that the ultimate harm was foreseeable to him").

3. Finally, in this case, unlike *Francis*, the trial court's instructions on malice did not completely eliminate any

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in the first degree, the State must have proven beyond a reasonable doubt: [¶] (1) That the Defendant unlawfully killed the alleged victim. [¶] (2) That the killing was malicious: That is, that the Defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victims were killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied * * * presumption. [¶] (3) That the killings were willful: That is, that the Defendant must have intended to take the life of the alleged victim. [¶] (4) That the killing was deliberate: That is, with cool purpose. [¶] (5) That the killing was premeditated. This means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval." These instructions were consistent with Tennessee law on first degree murder. See, *e.g.*, *State* v. *Bullington*, 532 S.W.2d 556, 559 (Tenn. 1976); *Swan* v. *State*, 23 Tenn. (4 Hum.) 136, 139 (1843); *Anthony* v. *State*, 19 Tenn. (1 Meigs) 265, 277 (1838); *Dale* v. *State*, 18 Tenn. (10 Yer.) 551, 551-552 (1837).

[21] Under Tennessee law, multiple gun shot wounds to the victim is a sufficient basis for the jury to find that the defendant acted with premeditation and deliberation. See, *e.g.*, *Houston* v. *State*, 593 S.W.2d 267, 273 (Tenn. 1980); *State* v. *Story*, 608 S.W.2d 599, 601 (Tenn. Crim. App. 1980).

of respondent's chosen defenses; on the contrary, the instructions on malice aforethought were simply irrelevant to the defenses that respondent raised at trial.

Respondent's primary defense was that Faulk's ex-husband, not he, had committed the crimes. In that respect, this case is not materially different from *Frady*, in which the Court held that the defendant was not prejudiced by similar instructions because his defense was that he had not been involved in the murder. 456 U.S. at 169-174. And although the evidence showing that respondent had committed the murders, aside from the testimony of Faulk's daughter, was largely circumstantial, the evidence plainly showed that whoever was responsible for the slayings acted with malice. Accordingly, since the evidence on this issue was overwhelming and was not controverted by respondent's defense that someone else did the killing, there is no realistic possibility that the instructions on malice could have prejudiced his alibi defense. See *Frady*, 456 U.S. at 169-174; *Martin* v. *Foltz*, 773 F.2d 711, 719 (6th Cir. 1985); *Tucker* v. *Kemp*, 762 F.2d 1496, 1501-1503 (11th Cir. 1985) (en banc); *McCleskey* v. *Kemp*, 753 F.2d 877, 903-904 (11th Cir. 1985) (en banc), petition for cert. pending, No. 85-6811; *Charles* v. *Foltz*, 741 F.2d 834, 839 (6th Cir. 1984); *Garland* v. *Maggio*, 717 F.2d 199, 203-204 (5th Cir. 1983); *McGuinn* v. *Crist*, 657 F.2d 1107, 1108-1109 (9th Cir. 1981), cert. denied, 455 U.S. 990 (1982); see also *Johnson*, 460 U.S. at 87 (plurality opinion). Beyond that, respondent did not object at trial to the instructions on malice (Pet. App. A10 n.6), which adds support to the conclusion that these instructions were not perceived as likely to prejudice his defense. See *Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985), slip op. 18 & n.11; *id.* at 2-3 (Stevens, J., concurring); *Engle* v. *Isaac*, 456 U.S. at 136 n.1 (Stevens, J., concurring in part and dissenting in part).[22]

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[22] Respondent's alibi defense was itself quite weak. Respondent did not testify; nor did any defense witness pinpoint his where-

Somewhat inconsistently, respondent also claimed that he was insane at the time of the murders and thus should not be held responsible for those crimes. But the jury was expressly instructed not to consider respondent's insanity claim unless and until it found that he had committed the crimes charged against him (8 Tr. 1091-1092). This instruction is consistent with Tennessee [23] (and federal [24]) law, under which a defendant's "diminished

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abouts at the relevant time. One defense psychiatrist testified that respondent offered only "vague" and "confusing" answers as to where he was that night (J.A. 100, 101; 6 Tr. 819, 843), while the other defense psychiatrist testified that he could not remember exactly what respondent had told him (J.A. 134; 7 Tr. 877). By contrast, several eyewitnesses testified for the State that Sam Faulk, who respondent claimed had committed the murders, had spent the entire evening at a local bar. See pages 2-3 note 1, *supra*.

[23] See *Graham* v. *State*, 547 S.W.2d 531 (Tenn. 1977) (insanity is a legal excuse for a crime). The Tennessee Supreme Court's decision in *Graham* adopted the ALI Model Penal Code test for insanity and also approved (547 S.W.2d at 543) questions for the jury on this issue that were adopted in *United States* v. *Smith*, 404 F.2d 720, 727 (6th Cir. 1968). Those questions are limited to the issue whether the defendant was sane at the time of the charged offense; they do not instruct the jury to consider evidence of a defendant's mental disease when determining whether he is guilty of the crimes charged against him. 404 F.2d at 727. The state courts' rulings in this case confirm this point. At trial, respondent proposed several jury instructions presenting a diminished capacity defense, all of which were rejected by the trial court. See R. 107, 110, 111-112, 116; 8 Tr. 1104. On appeal, respondent argued that the trial court's refusal to give these instructions was erroneous (see Assignments of Error, Brief and Argument on Behalf of Stanley Barnham Clark at 74-77, *State* v. *Clark*, No. 8149 (Tenn. Crim. App. filed May 16, 1980)), and the Tennessee Court of Criminal Appeals rejected his argument (see Pet. App. A36). It is thus clear that Tennessee does not have a diminished capacity defense to murder.

[24] Congress has rejected the diminished capacity defense for federal criminal prosecutions. See the Comprehensive Crime Control Act of 1984 (Insanity Defense Reform Act of 1984), Pub. L. No. 98-473, § 402, 98 Stat. 2057 (to be codified at 18 U.S.C. 20) (mental

capacity," as that defense is known, is not a defense to a crime unless it amounts to insanity. The malice charge therefore could not have affected respondent's insanity defense. See *Bowen* v. *Kemp*, 769 F.2d 672, 676-678 (11th Cir. 1985); see also *Johnson*, 460 U.S. at 87 (plurality opinion).

Nor did the instructions on malice prejudice any of the remaining defenses respondent asserted at trial. For instance, respondent also presented evidence to the effect that he was suffering from amnesia at the time of the trial. However, the jury was told that amnesia, by itself, was not a defense to any of the charges against respondent (J.A. 195; 8 Tr. 1098).[25] The instructions on malice were therefore irrelevant to this alleged defense. Respondent also claimed that he was voluntarily intoxicated at the time of the crimes and thus could not have possessed the *mens rea* necessary for murder. However, voluntary intoxication, while a defense to first degree murder, was no defense to second degree murder (J.A.

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disease does not constitute a defense unless it satisfies the test for insanity); S. Rep. 98-225, 98th Cong., 1st Sess. 229 (1983).

[25] See *Thomas* v. *State*, 201 Tenn. 645, 652-653, 301 S.W.2d 358, 361 (1957) (amnesia without more does not establish insanity); *Lester* v. *State*, 212 Tenn. 338, 344-348, 370 S.W.2d 405, 408-409 (1963) (same); *Burton* v. *State*, 217 Tenn. 62, 66-68, 394 S.W.2d 873, 875 (1965) (same); *Sparkman* v. *State*, 469 S.W.2d 692, 696-697 (Tenn. Crim. App. 1970). As the Tennessee Court of Criminal Appeals summarized in *Sparkman*, "[i]nsanity and amnesia are distinct conditions, even though amnesia sometimes is an incident of insanity. Insanity is incapacity to discriminate between right and wrong, while amnesia is simply the inability to remember. * * * Amnesia alone is no defense to a criminal charge, unless it is shown by competent evidence that the accused did not know the nature and quality of his action and that it was wrong." 469 S.W.2d at 696-697. The district court's ruling that amnesia is a defense under Tennessee law (Pet. App. A20) is clearly in error and should not be given any weight by this Court (see *Brockett* v. *Spokane Arcades, Inc.*, No. 84-28 (June 19, 1985), slip op. 8 & n.9).

193-195; 8 Tr. 1097-1098).[26] The instructions on malice therefore could have had no effect on this alleged defense either. Additionally, because respondent plainly did not succumb to amnesia or become intoxicated between the times that he shot Faulk and Browning, the jury's finding that he acted willfully and with premeditation and deliberation when he murdered Faulk clearly demonstrates that the jury found that respondent's claim of voluntary intoxication was insufficient to raise a reasonable doubt of his guilt of that crime.[27]

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[26] See *Pirtle* v. *State*, 28 Tenn. (9 Hum.) 663, 664-673 (1849) (voluntary intoxication may be a defense to first degree murder, by negating premeditation and deliberation, but is not a defense to second degree murder); *Haile* v. *State*, 30 Tenn. (11 Hum.) 154, 155-158 (1850) (same); *Lancaster* v. *State*, 70 Tenn. 575, 577-578 (1879) (same); *Cartwright* v. *State*, 76 Tenn. 376, 380-386 (1881) (same); *Thomas* v. *State*, 201 Tenn. at 647-651, 301 S.W.2d at 359-360 (same); *State* v. *Bullington*, 532 S.W.2d 556, 560 (Tenn. 1976) (same); *State* v. *Adkins*, 653 S.W.2d 708 (Tenn. 1983) (same); *State* v. *Plummer*, 658 S.W.2d 141, 143 (Tenn. Crim. App. 1983) (same); see also W. LaFave & A. Scott, *Criminal Law* § 45, at 345 (1972). The district court misconstrued state law in concluding that voluntary intoxication is a defense to a charge of second degree murder (Pet. App. A20).

[27] What is more, respondent's proof of amnesia and voluntary intoxication was less than overwhelming. Respondent's amnesia appears to have been quite selective: it was limited to the period immediately surrounding the time of the killings (J.A. 96-103, 116-117, 134; 6 Tr. 812-823, 843; 7 Tr. 877). Respondent's voluntary intoxication claim was based upon his statement to the defense psychiatrists that he had consumed as much as six six-packs of beer and one pint of vodka on the day in question, which appears to be at odds with his claim that he could generally remember the events of that day and that he could drive an automobile (J.A. 96-101; 6 Tr. 814-819). One defense psychiatrist expressed some doubt whether he believed respondent's claim (J.A. 97; 6 Tr. 814-815), and the State's psychiatrist testified that consumption of that amount of alcohol in one day "approach[ed] the lethal amount of alcohol," would render a person "extremely sick," and, even if not physically impossible, was "very unlikely" (J.A. 160-161; 6 Tr. 943-944).

In sum, it is beyond any reasonable doubt that respondent was not prejudiced by the erroneous instructions on malice. Neither of the two valid defenses asserted by respondent could have been affected by these instructions, and respondent's other claims did not state valid defenses under the instructions given to the jury or under state law. This case is not materially different from *Frady*, where the Court held that the defendant was not prejudiced by similar instructions. It necessarily follows that the lower courts erred by ordering that respondent be retried.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1985

APPENDIX

A. The following courts have held that jury instructions containing a conclusive presumption (*Sandstrom*; *Johnson*), a rebuttable presumption (*Francis*), or a similar type of error, may be harmless in a given case:

First Circuit: *United States* v. *Winter*, 663 F.2d 1120, 1144-1145 (1981), cert. denied, 460 U.S. 1011 (1983) (*Sandstrom* instruction harmless where defense was nonparticipation).

Second Circuit: *Fournier* v. *LeFevre*, 734 F.2d 125, 128-129 (1984) (*Sandstrom* instruction harmless where there was no issue at trial whether the defendant acted intentionally, only what precise intent the defendant had, and the defendant's own testimony established that he had either requisite intent); *Mancuso* v. *Harris*, 677 F.2d 206, 210-211 (1982) (*Sandstrom* instruction harmless in light of other instructions, felony-murder theory of liability, and defense of nonparticipation); *Nelson* v. *Scully*, 672 F.2d 266, 271-272, cert. denied, 456 U.S. 1008 (1982) (*Sandstrom* instruction harmless given other instructions); see also *Washington* v. *Harris*, 650 F.2d 447, 453-454 (1981), cert. denied, 455 U.S. 951 (1982) (dictum that *Sandstrom* instructions can be harmless). Compare *Simmons* v. *Dalsheim*, 702 F.2d 423, 424 (1983), aff'g on basis of district court's opinion, 543 F. Supp. 729 (S.D.N.Y. 1982) (jury instruction placing burden of proof on defendant on alibi defense prejudicial); *Ramirez* v. *Jones*, 683 F.2d 712, 715-716 (1982) (error prejudicial where intent to kill in dispute).

Fourth Circuit: *Tweety* v. *Mitchell*, 682 F.2d 461, 465 (1982), cert. denied, 460 U.S. 1013 (1983) (*Sandstrom* instruction harmless where there were "mitigating" instructions and the evidence of intent was overwhelming); see also *Fulton* v. *Warden*, 744 F.2d 1026, 1031-1034 (1984) (jury instruction shifting the burden of proof to

the defense on an alibi defense did not require setting aside the conviction, but applying a more demanding standard than the *Chapman* harmless error standard, because of habeas corpus considerations); *United States* v. *Davis*, 739 F.2d 172, 174-175 (1984) (jury instruction arguably placing burden of proof on defendant on intoxication defense harmless in light of other instructions requiring government to prove specific intent).

Fifth Circuit: *Garland* v. *Maggio*, 717 F.2d 199, 203-204 (1983) (*Sandstrom* instruction harmless where defense was nonparticipation); *Healy* v. *Maggio*, 706 F.2d 698, 701-702 (1983) (*Sandstrom* instruction harmless where proof of intent was overwhelming even though intent was a disputed issue, since defense was accidental homicide); *United States* v. *Fricke*, 684 F.2d 1126, 1129 (1982), cert. denied, 460 U.S. 1011 (1983) (*Sandstrom* instruction harmless where intent was not at issue); see also *United States* v. *Spiegel*, 604 F.2d 961, 968-970 (1979), cert. denied, 446 U.S. 935 (1980) (*Francis* instruction not plain error in that case). Compare *Mason* v. *Balkcom*, 669 F.2d 222, 227 (1982), cert. denied, 460 U.S. 1016 (1983) (*Sandstrom* instruction prejudicial where evidence of guilt was not overwhelming and defense was lack of premeditation and deliberation). But see *Hammontree* v. *Phelps*, 605 F.2d 1371, 1380 (1979) (mandatory, conclusive presumption cannot be harmless).

Sixth Circuit: *Logan* v. *Agshire*, No. 85-1290 (Dec. 9, 1985), slip op. 3-4 (*Sandstrom* instruction harmless where proof of intent overwhelming); *Martin* v. *Foltz*, 773 F.2d 711, 719 (1985) (" 'malice is implied' " jury charge is harmless where the only issue at trial was whether the defendant participated in the crime and there was no question that whoever committed the murder did so with an intent to kill); *Charles* v. *Foltz*, 741 F.2d 834, 839 (1984) (same instruction harmless in similar circumstances); *United States* v. *Crowder*, 719 F.2d 166, 172-173 (1983), cert. denied, 466 U.S. 974 (1984) (error harmless where proof of intent was sufficient even though

intent was a disputed issue); *Conway* v. *Anderson*, 698 F.2d 282, 285-286, cert. denied, 462 U.S. 1121 (1983) (error harmless where proof of intent was overwhelming and intent was not a disputed issue); *Krzeminski* v. *Perini*, 614 F.2d 121, 125, cert. denied, 449 U.S. 866 (1980) (*Sandstrom* instruction harmless where defendant admitted element of offense). Compare *Engle* v. *Koehler*, 707 F.2d 241, 246 (1983), aff'd by an equally divided court, 466 U.S. 1 (1984) (*Sandstrom* instruction prejudicial where intent was a disputed issue at trial); *Phillips* v. *Rose*, 690 F.2d 79, 81-82 (1982) (error prejudicial where evidence supported accident defense); *Burton* v. *Bergman*, 649 F.2d 428, 431-432 (*Sandstrom* instruction prejudicial where evidence of intent in dispute).

Ninth Circuit: *McGuinn* v. *Crist*, 657 F.2d 1107, 1108-1109 (1981), cert. denied, 455 U.S. 990 (1982) (*Sandstrom* instruction harmless where defense was alibi). Compare *In re Hamilton*, 721 F.2d 1189, 1191-1192 (1983) (*Sandstrom* instruction would be prejudicial if intent was a disputed issue at trial; remanding case to district court for further inquiry).

Eleventh Circuit: *Bowen* v. *Kemp*, 769 F.2d 672, 676-678 (1985) (*Sandstrom* instruction harmless where evidence conclusively established intent and defense was insanity); *Tucker* v. *Kemp*, 762 F.2d 1496, 1501-1503 (1985) (en banc) (*Francis* instruction harmless where defense was nonparticipation in the murder and evidence of intent was overwhelming); *McCleskey* v. *Kemp*, 753 F.2d 877, 903-904 (1985) (en banc), petition for cert. pending, No. 84-6811 (*Francis* instruction harmless where proof of intent overwhelming and defense was alibi); *Davis* v. *Kemp*, 752 F.2d 1515, 1521 (1985) (en banc), cert. denied, No. 84-6601 (June 3, 1985) (*Francis* instruction harmless where proof of intent was overwhelming and defense was nonparticipation); *Jarrell* v. *Balkcom*, 735 F.2d 1242, 1257 (1984) (*Francis* instruction harmless where proof of guilt was overwhelming and alibi was "very weak"); *Collins* v. *Francis*, 728 F.2d 1322, 1330-

1331 (1984) (*Sandstrom* instruction harmless where defense was nonparticipation); *id.* at 1351-1352 (Tjoflat, J., concurring specially) (same); *McCorquodale* v. *Balkcom*, 705 F.2d 1553, 1555-1556, adopted in pertinent part, 721 F.2d 1493, 1502 (1983) (en banc), cert. denied, 466 U.S. 954, order staying execution, 467 U.S. 1202 (1984), order vacating stay of execution, No. 83-6350 (Feb. 25, 1985) (*Sandstrom* instruction harmless where defense admitted guilt); *Lamb* v. *Jernigan*, 683 F.2d 1332, 1342-1343 (1982), cert. denied, 460 U.S. 1024 (1983) (*Sandstrom* instruction harmless where proof of guilt was overwhelming). Compare *Corn* v. *Kemp*, 772 F.2d 681, 683 n.2 (1985) (*Francis* instruction prejudicial where intent was a disputed issue); *Carter* v. *Montgomery*, 769 F.2d 1537, 1541-1542 (1985) (*Francis* instruction prejudicial where defense was accidental homicide); *Thomas* v. *Kemp*, 766 F.2d 452, 455-456 (1985) (*Francis* instruction prejudicial where proof of intent not overwhelming and defense was intoxication); *Drake* v. *Kemp*, 762 F.2d 1449, 1453, 1457 (1985), petition for cert. pending, No. 85-556 (*Francis* instruction harmful where one of the alternative bases of liability required proof of intent even though defense was alibi); *Brooks* v. *Kemp*, 762 F.2d 1383, 1390-1394 (1985) (en banc), petition for cert. pending, No. 85-553 (*Francis* instruction prejudicial where defense was accidental homicide); *Patterson* v. *Austin*, 728 F.2d 1389, 1395-1396 (1984) (*Francis* instruction prejudicial where evidence would have supported conviction for lesser offenses of voluntary or involuntary manslaughter, or self-defense).

District of Columbia Circuit: *United States* v. *Martin*, 475 F.2d 943, 946-950 (1973) (instruction placing burden of proof on defendant on intoxication defense is harmless); *United States* v. *Green*, 424 F.2d 912, 913 (1970) (instruction that an intentional act constitutes malice aforethought is not plain error where the jury found that the defendant premeditated and deliberated on an intent to kill); *Belton* v. *United States*, 382 F.2d 150, 154-155

(1967) (instruction that " 'the law infers * * * malice' " was not plain error where the jury found that the defendant premeditated and deliberated on an intent to kill).

The States: *People* v. *Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984) (dicta that failure to instruct jury on essential aggravating factor of capital sentence can be harmless where defendant was acquitted on that factor, defendant conceded that factor, or evidence conclusively established that factor; failure to give instruction in that case did not fit into these categories, however); *Wilson* v. *Zant*, 249 Ga. 373, 290 S.E.2d 442, cert. denied, 459 U.S. 1092 (1982) (error harmless where defense was alibi); *People* v. *Frazier*, 123 Ill. App. 3d 563, 573-575, 463 N.E.2d 165, 173-174 (1984) (error harmless where proof overwhelming); *State* v. *Johnson*, 233 Kan. 981, 986, 666 P.2d 706, 711 (1983) (rebuttable presumption not invalid); *State* v. *Boyce*, 471 A.2d 687, 687 (Me. 1984) (conclusive presumption harmless where defendant conceded the issue in his trial testimony); *People* v. *Wright*, 408 Mich. 1, 26-34, 289 N.W.2d 1, 9-12 (1980) (error harmless where substantial proof of defendant's guilt; error prejudicial where proof more tenuous); *People* v. *Dolsen*, 301 N.W.2d 865, 867-868 (Mich. Ct. App. 1980) (error harmless where defense was alibi); *People* v. *McCracken*, 100 Mich. App. 698, 703-706, 300 N.W.2d 376, 379-380 (1980) (error harmless where proof of defendant's guilt is overwhelming); *State* v. *Hamilton*, 605 P.2d 1121, 1131-1133 (Mont.), cert. denied, 447 U.S. 924 (1980) (error harmless given defendant's statements at time of the crime); *State* v. *Sheldon*, 301 N.W.2d 604, 611-613 (N.D. 1980), cert. denied, 450 U.S. 1002 (1981) (conclusive presumption harmless where defendant was convicted of an unrelated offense); *State* v. *Flack*, 58 Or. App. 330, 335-337, 648 P.2d 857, 860-861 (1982) (error harmless where proof overwhelming); *State* v. *Bolin*, 678 S.W.2d 40, 45 (Tenn. 1984) (error harmless where proof

overwhelming); *Saldana* v. *State*, 685 P.2d 20, 23 (Wyo. 1984) (error harmless given other jury instructions); cf. *State* v. *Taylor*, 651 S.W.2d 603, 605-606 (Mo. Ct. App. 1983) (instruction shifting burden of proof to defendant on defense of extreme emotional disturbance harmless where evidence was insufficient to support his defense).

B. The following courts have held that jury instructions containing a conclusive presumption (*Sandstrom*; *Johnson*), a rebuttable presumption (*Francis*), or a similar error, cannot be harmless in any case:

Eighth Circuit: *United States* v. *Ben M. Hogan Co.*, 769 F.2d 1293, 1297-1298 (1985) (conclusive presumption that bid-rigging agreement affected interstate commerce in a Sherman Act prosecution). Compare *Dietz* v. *Solem*, 640 F.2d 126, 131 (1981) (rebuttable presumption not harmless even though chief issue at trial was whether defendant had committed actus reus); *Stump* v. *Bennett*, 398 F.2d 111, 122-123 (en banc), cert. denied, 393 U.S. 1001 (1968) (instruction placing burden of proof on defendant on alibi defense harmful where alibi defense was invoked at trial). But cf. *Redding* v. *Benson*, 739 F.2d 1360, 1363-1365 (1984), cert. denied, No. 84-5908 (Feb. 19, 1985) (failure to instruct the jury on essential element of the offense is harmless where the jury necessarily found that element nonetheless because of other instructions).

The States: *State* v. *Truppi*, 182 Conn. 449, 465-467, 438 A.2d 712, 721 (1980), cert. denied, 451 U.S. 941 (1981) (conclusive presumption cannot be harmless on any charge to which the instruction referred); *State* v. *Johnson*, *supra* (conclusive presumption cannot be harmless); *State* v. *LaForge*, 347 N.W.2d 247, 256 (Minn. 1984) (suggesting that a conclusive presumption cannot be harmless); *Lowry* v. *State*, 671 S.W.2d 601, 603 (Tex. Ct. App. 1984) (suggesting that an instruction shifting the burden of proof to the accused on an element of the

offense cannot be harmless); *State* v. *Martell*, 465 A.2d 1346, 1348 (Vt. 1983) (conclusive presumption cannot be harmless); *State* v. *McCormick*, 277 S.E. 629, 631-632 (W. Va. 1981) (suggesting that a conclusive presumption is always invalid under state law).

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No. 84-1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JIMMY C. ROSE, WARDEN, *Petitioner,*

v.

STANLEY BARHAM CLARK, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENT ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION THE UNIVERSITY OF VIRGINIA POST-CONVICTION ASSISTANCE PROJECT

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QUESTION PRESENTED

Whether the state trial court's error in instructing the jury on an impermissible presumption with respect to criminal intent was harmless error in a case in which the error, combined with other instructions, plainly required that the jury presume Mens Rea despite defense evidence casting doubt upon the defendant's state of mind.

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STATEMENT OF INTEREST OF THE AMICI CURIAE

The National Association of Criminal Defense Lawyers (hereinafter NACDL) is a District of Columbia non-profit corporation founded in 1958. More than 2,000 lawyers, citizens of every State, belong. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or judges of the state or federal courts. The NACDL is the only national bar organization on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The National Legal Aid and Defender Association (hereinafter NLADA) is a private, non-profit national membership organization headquartered in Washington, D.C. whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing representation to indigents arrested on criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners.

The Post-Conviction Assistance Project (hereinafter P-CAP) is a Virginia nonprofit corporation organized and staffed by student volunteers at the University of Virginia School of Law. P-CAP receives its funding from University of Virginia student activity funds, the University of Virginia Law School Foundation, and private donations. P-CAP members answer inquiries and requests for legal assistance from *pro se* litigants and, under the supervision of counsel, represent indigent litigants in both civil

and criminal matters in Virginia. Faculty members of the School of Law and Virginia attorneys in private practice provide the required supervision.

None of the amici have a financial interest in this case. Their interest is in the important legal issue on which the Court has granted review. Both parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

This Court has not held that in every instance in which a trial court gives jury instructions that violate *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), reversal of a defendant's convictions are required. And the United States Court of Appeals did not so hold in this case. The appendix to the amicus curiae brief filed by the United States reveals that the tremendous weight of authority is that *under some circumstances Sandstrom* errors may be so inconsequential as to be declared harmless. Amici believe that these decisions are sound and that they are in accord with the reasoning underlying all of the opinions of the Justices in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983).

For reasons to be spelled out at greater length in the full argument, amici believe that ordinarily when a defendant specifically objects to instructions that violate *Sandstrom* and calls the trial judge's attention to the constitutional problems with those instructions, and the defendant clearly makes an issue of the mens rea aspect of a case, a deliberate choice by the trial judge to give unconstitutional instructions rarely can be harmless error. In this situation, there is absolutely no justification for the continuing insistence by trial judges on delivering jury instructions that have been condemned on constitutional grounds, and the defendant's objection is a demonstration that mens rea is an important aspect of the case from the viewpoint of the defense.

Amici also believe that this Court has plainly indicated to state courts that they may bar a defendant from challenging instructions on appeal, by way of certiorari, or on habeas corpus, as violative of *Sandstrom* if the defendant fails to make a contemporaneous and proper objection to the instructions.[1] *Engle* v. *Issac*, 456 U.S. 107 (1982). Thus, the Tennessee state courts could have used, and in future cases may decide to use, a contemporaneous objection rule which would make it virtually impossible for defendants like Respondent, who failed to make a proper objection in the trial court, to challenge jury instructions on *Sandstrom* grounds.

The Tennessee courts utilize a contemporaneous objection rule in most cases.[2] Yet, the Tennessee Court of Criminal Appeals specifically reached the merits of Respondent's constitutional attack on the jury instructions and concluded that those instructions were valid.[3] Thus, the state court, as a matter of state law and state policy, chose not to rely on a procedural default and instead to determine the constitutional propriety of the instructions which Respondent challenged for the first time on appeal. Thus, this is not a case in which a State court is being compelled by federal law to reach the merits

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[1] Habeas corpus review may be permitted if the defendant establishes cause and prejudice under this Court's holding in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), for failing to make a proper objection. Cause and prejudice are not readily found, however. *See, e.g., Engle* v. *Issac*, 456 U.S. 107 (1982). The rare case in which the Court has excused a defendant who did not object is *Reed* v. *Ross*, ____ U.S. ____, 104 S. Ct. 2901 (1984). *Reed* is unlikely to be repeated in light of the age of the conviction and the holding of *Engle*.

[2] The Tennessee Court of Criminal Appeals recognized this in its opinion, at page 37 of Appendix C to the Petition for Certiorari.

[3] The opinion of the state intermediate appellate court is reproduced as Appendix C to the Petition for Certiorari.

of an issue. The State court chose to reach the merits when it did not have to.

These instructions were found by a United States District Court[4] and by the United States Court of Appeals for the Sixth Circuit[5] to violate *Sandstrom*. This Court denied certiorari with respect to the constitutional validity of the instructions, and amici assume therefore that the instructions were impermissible.

The United States Court of Appeals held that the error was not harmless, although it recognized that *Sandstrom* errors may under some circumstances be harmless. Amici believe that the jury instructions delivered by the trial court, and concessions in the Petition for Certiorari and the Brief for Petitioner, plainly establish that the presumption instructions given by the Trial Judge deprived the defendant, as a matter of law, of his right to have the jury consider his defense, which was plainly available under state law. Thus, amici argue that this Court need not hold that *Sandstrom* instructions are always prejudicial in order to affirm the Court of Appeals. Indeed, amici believe that the decision of the Court of Appeals is indisputably correct if the totality of the trial court's jury instructions are examined.

Thus, amici ask this Court to affirm the decision of the United States Court of Appeals and to hold that in this case there was prejudicial error under the normal standard for review of constitutional errors. Amici believe that no automatic reversal rule is required, but that trial judges should clearly understand that a defendant's

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[4] Its opinion, 611 F. Supp. 294 (M.D. Tenn. 1983), is reproduced as Appendix B to the Petition for Certiorari.

[5] Its unpublished opinion is reproduced as Appendix A to the Petition for Certiorari. The affirmance is listed at 767 F.2d 1006 (6th Cir. 1985).

timely and specific *Sandstrom* objections may not be ignored, and that it will be a rare case in which a conviction will be affirmed when *Sandstrom* error takes place notwithstanding a diligent effort by the defendant to avoid the unconstitutional instructions.

ARGUMENT

I. In Most Cases In Which A Trial Court Gives Instructions That Violate *Sandstrom* Over The Specific Objection Of A Defendant Who Clearly States That Mens Rea Is An Important Issue To The Defense, There Is A Reasonable Possibility That The Erroneous Instructions Are Prejudicial And There Is No Reason Why The Trial Court's Purposeful Error Should Be Protected Under The Harmless Error Rule

At one time in the United States, any error in the processing of a case, particularly a criminal case, was likely to require automatic reversal. *See generally*, Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988, 1000-1005 (1973). The automatic reversal rule undoubtedly provided windfalls to losing litigants and imposed retrial burdens on trial courts that could not be justified in some cases by the actual harm associated with an error. *Id.* at 1004-1005. Movement toward harmless error rules—e.g., 28 U.S.C. § 2111; Fed. R. Civ. P. 61; Fed. R. Evid. 103(a)—represented a judgment that some errors have too little impact on the outcome of a trial to warrant acceptance of the social costs associated with retrials.[6]

This Court has recognized the harmless error rule in numerous criminal cases, both with respect to constitutional and nonconstitutional errors. *See, e.g., Kotteakos* v. *United States*, 328 U.S. 750 (1946); *Chapman* v. *California*, 386 U.S. 18 (1967). The Court has stated that the test

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[6] This Court established this in *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

of whether state court errors of constitutional magnitude are prejudicial or harmless is a federal test. *Chapman* v. *California*, *supra*. A constitutional error generally is harmless in a criminal case only if it can be said with fair assurance that there is no reasonable possibility that the error contributed to the finding of a defendant's guilt. *Chapman*, 386 U.S. at 24.

In *Chapman*, the Court recognized that certain errors may be so devastating that they will never be regarded as harmful. Both the Petitioner and the United States as amicus curiae recognize this aspect of *Chapman*. The Petitioner asks this Court simply to hold that *Sandstrom* errors are not among those that require automatic reversal. The United States elaborates at greater length reasons for distinguishing *Sandstrom* from the constitutional violations that it concedes require automatic reversal.

Amici agree with the United States that the history of automatic reversal in this country and in England suggests that it is a device to be used with extreme caution.[7] *See* Saltzburg, *supra*, at 1026-27. Amici would go even further than the United States in this regard and recognize that even the violations identified by the United States as requiring automatic reversal could, depending on the circumstances of a particular case, be harmless error.

For example, the United States cites *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), as among the examples of constitutional cases

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[7] Amici make this argument based upon the assumption that constitutional violations that do create a reasonable likelihood of prejudice will result in reversals and that appellate courts will apply the harmless error test accurately and with a careful eye on possible prejudice to defendants.

involving rights which, if violated, always would require reversal.[8] Amici would examine these rights somewhat differently. If, for example, a state trial judge who presided over a preliminary hearing had some financial interest in a case, but after accurately finding probable cause another judge presided over the trial, amici believe that a *Tumey* violation might be considered harmless. This is especially likely if there is no claim that the preliminary hearing affected the trial. Similarly, amici would suppose that if a defendant were denied counsel at a preliminary hearing or if counsel were ineffective at that hearing, the resulting error might also be harmless.

Amici suggest to the Court that it is proper to state, as it appears that the plurality and dissenting opinions in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), recognized with respect to *Sandstrom* errors, that there are some kinds of mistakes that almost always will require reversal because they are so likely to be prejudicial. Amici would include the right to counsel and the right to a fair judge among these rights, as the Court included them in *Chapman*.

The United States argues that *Sandstrom* errors have none of the attributes that support an automatic reversal rule. But, amici do not argue any rule of automatic reversal to the Court. Rather, they suggest to the Court that *Sandstrom* errors closely resemble the kinds of errors that should almost always require reversal when a defendant calls the error to the attention of the trial judge, makes the correct constitutional argument, and the trial judge refuses to correct the error. Although the United States apparently concedes that if a trial judge directed the jury to return a guilty verdict, reversal would be required, because the trial judge would have invaded the

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[8] Of course, these are among the cases cited in *Chapman*.

defendant's right to trial by jury,[9] it argues, however, that a *Sandstrom* error is a partial deprivation of the right to a jury trial and warrants different treatment.

Amici respectfully submit that the United States has missed a crucial aspect of cases in which reversal is the usual result of an error. That aspect is the ease with which the error might be avoided. There is no reason why counsel should be denied to a defendant in the face of precedents giving defendants the right to assistance of counsel. The error generally is inexcusable both because it is likely to be harmful and because it is difficult to justify. Similarly, there is no reason why a judge should be assigned to a case in which he or she stands to profit from one outcome or another. The chance of harm is high and there is no legitimate reason for such an assignment.

Amici believe that *Sandstrom* errors should be analyzed in the same way, with one caveat: the correct approach in most cases (although it does not apply to the facts of the instant case) is for a reviewing court to focus on the conduct of the defendant at trial and to examine whether the defendant brought any *Sandstrom* problems to the trial judge's attention and explained why these problems might deprive the defendant of a fair trial by jury. Once the defendant does so, amici believe that state courts have no legitimate excuse for continuing to instruct juries in the language of presumptions that has been condemned by this Court since 1979. The argument by the State of California as amicus curiae begins with a candid admission that this Court's decisions in *Sandstrom*, *supra*, and *Francis* v. *Franklin*, ___ U.S. ___, 105 S. Ct. 1965 (1985), should cause no "fear" among the

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[9] This situation would, of course, almost always require reversal. But it is possible to envision a jury convicting on a count unaffected by the judge's instruction. Amici do not believe that a finding of harmlessness would necessarily be inappropriate.

States. The State goes on to suggest that trial judges would be better advised to abandon reliance on presumption instructions.[10]

Amici respectfully suggest that a defendant who specifically objects to erroneous *Sandstrom* instructions and who indicates to the trial judge that such instructions may deny fair jury consideration of one or more elements of an offense demonstrates the importance of the mens rea issue in the defense theory of a case. Since there is absolutely no reason why a trial judge should persist in giving the unconstitutional instructions, there is every reason to assume that the *Sandstrom* error is prejudicial in this circumstance.[11]

The argument that amici make to the Court is that there are some errors that ought not be tolerated when the circumstances indicate that the government official who errs is on notice of the problem and has no legitimate reason for the error. Surely this must account in part for the Court's statement in *United States* v. *Agurs*, 427 U.S. 97, 106 (1976), that "[w]hen the prosecutor receives a

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[10] This advice certainly makes sense in view of this Court's decision in *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979), which clearly indicates how trial judges may instruct juries concerning permissible inferences without running into constitutional problems. In fact, the Tennessee Supreme Court held in a recent decision, *State* v. *Martin*, ____ S.W.2d ____, decided December 30, 1985, and not yet reported, that the word "presumption" should not be used to define malice in murder cases.

[11] Consistent with the argument they have made regarding other errors, amici can foresee situations in which a defendant will object to *Sandstrom* instructions but such instructions could not possibly hurt the defense. If, for example, in a murder case the defendant has raised a defense of alibi and stipulated that whoever committed the offense did so with malice, *Sandstrom* instructions would be objectionable on the ground that they are irrelevant but not because they have any tendency to be prejudicial.

specific and relevant request [for production of evidence that might be exculpatory], the failure to make any response is seldom, if ever, excusable."[12]

If the defendant calls *Sandstrom* problems to the trial judge's attention and specifically indicates why the problems threaten a fair trial for the defense, there is an opportunity for the judge to take corrective action that is not present in many other situations—e.g., when the government, unbeknownst to the Court, fails to disclose exculpatory evidence. Moreover, the *Sandstrom* problems are so easily corrected that it is difficult to understand why the State of Tennessee, the United States, and the State of California would argue against a rule such as that proposed by amici.[13]

The rule which amici suggest would meet the concerns expressed in Justice Blackmun's plurality opinion in *Connecticut* v. *Johnson*, 460 U.S. 73, 85-86, that a jury may fail to consider evidence of intent because of a presumption instruction, as well as the concerns expressed in Justice Powell's dissenting opinion in *Johnson*, 460 U.S. at 94-99, that reversal should not be required when a reasonable jury would not have been affected by presumption language in instructions. Amici respectfully suggest that were lower courts to focus on the specificity and timeliness of *Sandstrom* objections, cases like *Johnson* and

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[12] This is exactly the approach that amici recommend: assuming that the failure to respond by a trial judge is seldom, if ever, excusable. Amici have suggested—*see* note 11 *supra*— that there may be harmless errors. They believe that their approach is consistent with this Court's post-*Agurs* decision in *United States* v. *Bagley*, ____ U.S. ____, 105 S. Ct. 3375 (1985).

[13] It is unclear exactly what standard the Petitioner and its amici would have the Court adopt. California, for example, appears to accept *Chapman* while simultaneously arguing for proof of actual prejudice.

Francis v. *Franklin*, ___ U.S. ___, 105 S. Ct. 1965 (1985), could be more easily decided. Where the defendant failed to specifically point to a *Sandstrom* problem, lower courts might well find in most cases that none existed, or that any problem really was unimportant to the defense.[14]

II. This Court's Decisions Plainly Recognize That A State May Effectively Preclude A Defendant From Raising A *Sandstrom* Claim Not Specifically Identified And Brought To The Attention Of The State Trial Judge

Under this Court's decisions in *Wainright* v. *Sykes*, 433 U.S. 72 (1977), and *Engle* v. *Issac*, 456 U.S. 107 (1982), Tennessee and every other State may bar a defendant from raising on appeal or on collateral attack a *Sandstrom* claim not properly raised at trial. A State that is concerned about unnecessary retrials might be well advised to do so, especially if it takes the view that defendants who are truly concerned about the potential prejudice of jury instructions will object to them.

The Tennessee Court of Criminal Appeals cited two cases—*Pope* v. *State*, 528 S.W.2d 54 (Tenn. Crim.Apps. 1975); *Mellons* v. *State*, 560 S.W.2d 634 (Tenn. Crim.

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[14] Amici recognize that Respondent failed to object to the impermissible instructions and that the approach they recommend certainly does not assist him. They believe, for reasons stated in Argument III, *infra*, that the instructions given at Respondent's trial actually deprived him of his right to defend against the mens rea element of first and second degree murder. Thus, under the *Chapman* standard, the instructions cannot be harmless. As noted in Argument II, *infra*, the prejudicial effect of the instructions would not by itself have been sufficient to compel a State appellate court to consider Respondent's claim or to permit him to bring a federal habeas corpus attack on the instructions. But, the State Court of Criminal Appeals made a conscious choice to evaluate the merits of the claim, and amici submit that on the merits Respondent was severely hurt by the erroneous instructions.

Apps. 1977)—that rely upon a contemporaneous objection bar to appellate review of instructions not challenged in the trial court. (Appendix C to Petition for Certiorari, at 37.) Yet, the Court chose to address the merits of Respondent's *Sandstrom* claim. Apparently, it believed that if a *Sandstrom* violation had been committed, Respondent should be permitted to correct the error.[15]

In light of the action taken by the State Court of Appeals, the argument that reversal because of a *Sandstrom* violation would unduly burden the state judicial system should be rejected. Presumably, the State Court of Appeals decided that it was important that Respondent not have suffered from a *Sandstrom* violation, important enough to jettison for purposes of this case the contemporary objection ban and to reach the merits. If this Court concludes, as amici believe that it should, that a *Sandstrom* violation occurred, affirmance of the decision below by the United States Court of Appeals is consistent with the approach taken by the State Court of Appeals.

III. The Jury Instructions Given By The Trial Court And The Concession By The Petitioner Clearly Establish A *Sandstrom* Violation And Demonstrate That Petitioner Was Denied His Right To Have The Jury Consider His Mens Rea Defense.

Among the trial judge's instructions to the jury were the following:

> Any person who willfully, deliberately, maliciously, and with premeditation kills another person is guilty of murder in the first degree.

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[15] Since Tennessee could have barred Respondent from raising any attack on the jury instructions as a result of his violation of the contemporaneous objection rule, surely the Tennessee Court of Criminal Appeals, had it chosen to do so, could have held that the only review on appeal would be under a cause and prejudice approach similar to that chosen by this Court in *United States* v. *Frady*, 456 U.S. 170 (1982). This state court did not so hold.

> For you to find the Defendant guilty of murder in the first degree, the State must have proven beyond a reasonable doubt:
>
> (1) That the defendant unlawfully killed the alleged victim.
>
> (2) That the killing was malicious: That is, that the Defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victims were killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption.
>
> (3) That the killings were willful: That is, that the Defendant must have intended to take the life of the alleged victim.
>
> (4) That the killing was deliberate: That is, with cool purpose.
>
> (5) That the killing was premeditated. This means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval. (J.A. 184-85)

The trial judge defined second degree murder as follows:

> For you to find the Defendant guilty of this offense, the State must prove beyond a reasonable doubt that: (1) The defendant unlawfully and willfully killed the alleged victim; and (2) The killing was malicious. (J.A. at 186)

Following these instructions, the court defined "malice," which is an element of its instructions on both first and second degree murder:

> Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exists in the mind of the slayer. Malice is an intent to do any injury to another, a design formed in the mind of doing mischief to another.
>
> Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.
>
> Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice. (J.A. at 186-87)

After malice was defined, the trial judge gave the presumption instructions which the lower federal courts held were in violation of *Sandstrom:*

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a pre-

> sumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances. A deadly weapon is any weapon or instrument which from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury. (J.A. at 187-88)

In order to understand the magnitude of the prejudice resulting from the presumption instructions, it is first necessary to return briefly to the elements of first degree murder and second degree murder. In his instructions on both degrees of murder, the trial judge explained to the jury that it was bound to acquit the defendant if it had a reasonable doubt as to whether there was malice. To find express malice, the jury had to find "an intent to do an injury to another" at and before the killing. (J.A. at 186) To find implied malice, the jury had to find "a wicked, depraved, and malignant spirit." (J.A. 187).[16]

The Petitioner and the amicus briefs filed in support of the Petitioner's argument argue that the State Court of Criminal Appeals correctly ruled that the Respondent's defenses did not place malice in issue. The United States argues along with the Petitioner that evidence of malice was overwhelming, but in making this argument neither the United States nor the Petitioner focus on the Tennessee definition of malice.

Amici urge on behalf of Respondent that it is vital, in order to assess fairly the prejudice resulting from the erroneous presumption instructions, to concentrate on the defenses raised by Respondent and how they relate to

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[16] Moreover, as to first degree murder, the judge told the jury that it could not convict unless it found willfulness, which he defined as "the intent to take the life of another," and deliberateness, which he defined as "with cool purpose." Obviously, these elements were closely related to the malice instruction, focusing on the mens rea of the defendant.

the definition of malice used in the Tennessee trial court. In his opening statement in that court, Respondent placed mens rea in issue. (J.A. at 8) It is apparent that Respondent had expert evidence that he suffered from longstanding depression and was mentally ill. (J.A. at 87) This expert testimony was bolstered by lay testimony, actually elicited in part by the prosecution, that the Respondent suffered physical and emotional problems during the year before the killings. He had lost 35 pounds, became withdrawn and seemed nervous for a year. (J.A. at 68-70) Additional expert testimony, brought out by the prosecution, established that Respondent had suffered head injuries that had led to chronic headaches. (J.A. at 91-92) Moreover, the trial judge recognized that there was evidence supporting the defendant's claim that he was substantially intoxicated at the time of the killings, and he instructed the jury on intoxication. (J.A. at 194)

The error in the Petitioner's argument and in the supporting argument of the United States is the assumption that the presumption instructions did not affect the defense when, in fact, they negated the defense. Respondent's mens rea defense[17] was that he lacked malice. To prove this he offered evidence of his mental illness, plus his intoxication, to prove[18] that he lacked actual or implied malice.

If alcohol plus mental illness had a tremendous effect upon Respondent, then a jury might have concluded that he did not intend to hurt anyone when he acted.[19] This

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[17] This is different from his insanity defense.

[18] Technically, he did not have to prove anything. He offered the proof in an effort to create a reasonable doubt as to his guilt.

[19] Thus, whether or not the mental illness was sufficient, standing alone, to establish an insanity defense, Respondent's argument was that his mental condition and his drinking rendered him unable to have the intent necessary for malice.

would cast doubt as to express malice.[20] And, as for implied malice, Respondent wanted the jury to consider whether he had "a wicked, depraved, and malignant spirit" or whether he was sick and his sickness was complicated by alcohol, which would cast doubt on implied malice.

The trial judge told the jury that it could consider evidence of drunkenness only on the question of premeditation. (J.A. at 194) Petitioner concedes that this is the case in his Petition for Certiorari at 11, and repeats this in his Brief. In the Petition, the argument is made that voluntary intoxication "does not, as a matter of law, negate the element of malice." (Page 11) Similarly, Petitioner argues in the Petition that the insanity defense technically is not considered by the jury until it has found the elements of the crime proved (Page 11), and repeats this argument in his Brief. The trial judge, in fact, told the jury that it was not to consider the defense of insanity until after evaluating the elements of the offense. (J.A. at 190)

The combined effect of the presumptions which the trial judge gave the jury and his instructions on the testimony regarding intoxication and insanity was as follows: The jury understood that it was to presume malice unless some evidence suggested its absence, and that all of the evidence that the defendant offered concerning mental illness and intoxication, which otherwise might have been viewed as substantially probative as to malice, could not be considered on that element with respect to either first or second degree murder.

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[20] Because of the close relationship of the doctrines of willfulness and deliberateness to express malice, these elements also might have been effected by the presumptions and the other instructions that affected the jury's consideration of the malice element.

Respondent does not argue that intoxication as a matter of law negates malice or that mental illness does. Rather, he argues that the circumstances bearing upon his intent and state of mind cannot be totally excluded and that the combination of presumption instructions and the other instructions had the effect of excluding them and leaving the presumptions standing as directives governing the jury's decisionmaking.

Suppose, for instance, the Respondent lacked the requisite intent not solely because of a mental disease or defect, but because of the way in which heavy alcohol consumption affected long-term depression. This is not a diminished responsibility defense. It is defense evidence that negates express malice and that might cause a jury to find no implied malice, or at least to have a reasonable doubt regarding implied malice. Respondent need not address the question whether a State might constitutionally punish as murder conduct that is unintentional, for Tennessee has chosen to define both first and second degree murder in a manner that focuses on intent. Surely, Tennessee may not establish this element of criminal activity and then bar the defendant from offering evidence to show that he lacked the very intent which comprises the mens rea element of the crime charged. Yet, that is exactly what the trial judge's instructions did.[21]

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[21] The prosecutor opened to the jury by stating that he would prove that the defendant's acts were intended to kill. He made a specific reference to "a heart unconcerned about the welfare of others." (J.A. at 6) In his first closing argument, the prosecutor specifically stated that the trial judge would instruct the jury "that all killings or all murders are presumed to be malicious unless rebutted." (J.A. at 170) In his final closing argument, the prosecutor chose again to define the word "malicious" as "an evil spirit, and heart bent on mischief regardless of social duty." (J.A. at 181) The prosecutor also elicited testimony from a defense expert by means of a leading question, which told the jury that a single incident of heavy drinking would not

As for the amnesia evidence offered by the Respondent, Petitioner correctly states that amnesia is not a defense. This is exactly what the trial judge told the jury: amnesia "is in itself no defense to this charge." (J.A. at 195) Respondent's use of amnesia was to bolster the mens rea defense. (J.A. at 87-88) His inability to remember anything about the events was offered to corroborate the theory that he lacked express and implied malice because of the condition that he was in. Yet, the trial judge's instruction effectively removed from the jury's consideration the possibility that all of this evidence might have caused the jury to find a reasonable doubt on the malice element of both degrees of murder.

For these reasons, Respondent fairly claims that the presumptions used in these instructions absolutely deprived him of his defense. This cannot be harmless error.

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amount to a mental illness. (J.A. at 98) This may have led the jury to conclude, in light of the trial judge's instructions, that it could not consider drinking or mental problems in deciding whether the defendant had the requisite intent. Surely the defendant was entitled to prove an absence of an intent to kill and that whatever he did was not the result of a "heart bent on mischief regardless of social duty." In *State* v. *Martin*, note 10, *supra*, the Tennessee Supreme Court recognized the confusion inherent in such instructions, especially where, as in the instant case, the trial judge fails to instruct on malice when he gives the elements of first degree murder.

CONCLUSION

Amici ask that the Court affirm the decision of the United States Court of Appeals for the Sixth Circuit on the basis of the arguments offered herein.

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No. 84-1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JIMMY ROSE, Warden,

Petitioner,

—v.—

STANLEY BARHAM CLARK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, AMICI CURIAE, IN SUPPORT OF THE RESPONDENT

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Vasquez v. Hillery,
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In re Winship,
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Other Authorities

McCormick, Evidence (3rd Ed. 1984).....25

Morano, "A Reexamination of the Development of the Reasonable Doubt Rule", 53 B.U.L. Rev. 507 (1975).....12

May, "Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases", 10 A.L. Rev. 642 (1876).....11

N. L. Rabinovich, Probability and Statistical Influence in Ancient and Medieval Jewish Literature (1973).....11

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INTEREST OF AMICI CURIAE*

The American Civil Liberties Union ("the ACLU") is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the rights secured to people of this country by the Constitution. The American Civil Liberties Union of Tennessee is one of its affiliates.

The ACLU has long worked to defend the rights of criminal defendants and has filed numerous briefs, both as counsel for a litigant and as amici curiae is cases involving the interpretation of federal constitutional provisions related to criminal cases.

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* The parties have consented to the filing of this brief amici curiae. Letters of consent are being lodged with the Court.

SUMMARY OF ARGUMENT

The single issue addressed by amici is whether a jury instruction that impermissibly shifts the burden of proof to the defendant on the issue of malice in a homicide case, in violation of this Court's interpretation of the Due Process Clause in Sandstrom v. Montana 442 U.S. 73 (1979), should be considered harmless error when the issue is properly preserved for review. Amici believe that this question must be answered in the negative.

As with other rights whose violation this Court has deemed harmful per se, the requirement that the prosecution prove the essential elements of the charge against the accused beyond a reasonable doubt is basic to an accused's right to a fair trial. For, like the right to counsel, the right to trial before an unbiased judge, the right to indictment and trial before a jury selected

without racial discrimination, and the prohibition against variance between the indictment and the proof offered at trial, the requirement that a judge accurately inform a jury that the prosecution must prove the essential elements of the crime alleged beyond a reasonable doubt is critical to the structural integrity of the criminal fact-finding process. The requirement that criminal charges be proven beyond a reasonable doubt is central to the presumption of innocence, to an accused's right to trial by jury, and to the maintenance of respect for our criminal justice system. Proceedings conducted in violation of such a fundamental precept must never be condoned.

Under the principles espoused by the petitioner and the Solicitor General, under which only innocence (or guilt) is relevant, the government could presumably simply

announce that "obviously" guilty defendants convicted, secure in the knowledge that, on habeas corpus, any violation of constitutional right would be deemed harmless beyond a reasonable doubt. But that is not, of course, the law. This Court has repeatedly and necessarily held some rights so vital to the system of justice we constitutionally maintain that they must be vindicated regardless of guilt. The right at issue here is such a right.

The Court may, however, decide this case on a narrower ground as it did in Francis v. Franklin, 85 L.Ed.2d 344 (1985). Even if a failure to inform a jury that it must utilize a reasonable doubt standard on each essential element of a criminal case could theoretically be treated as "harmless error", a determination that the constitutional error here was harmless beyond a reasonable doubt is impossible, since the evidence presented

on the issue of guilt was contradictory and equivocal, and the faulty presumption was particularly likely to interfere with fair consideration of respondent's insanity defense. Accordingly, the Court could affirm on that narrow ground, leaving for another day the overriding question whether Sandstrom error may ever be found harmless beyond a reasonable doubt.

ARGUMENT

I. A JURY INSTRUCTION THAT IMPERMISSIBLY SHIFTS TO THE DEFENDANT THE BURDEN OF PROOF ON THE ISSUE OF MALICE IN A HOMICIDE CASE SHOULD NEVER BE CONSIDERED HARMLESS ERROR.

In Chapman v. California, 386 U.S. 18, 23, 24 (1967), this Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction could never be treated as harmless," and some that may be considered harmless if the beneficiary of the error "proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Like other rights whose violation this Court has deemed harmful per se,[1] the

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[1] The following constitutional errors have been held by this Court to be harmful per se: denial of the right to counsel, Holloway v. Arkansas, 435 U.S. 475, 488-89 (1978); use of coerced confessions, Chapman v. California, 386 U.S. at 23 n.8, citing Payne v. Tanoe, 356 U.S. 560, 568 (1958); variance between indictment and proof offered at trial, Stirone v. United States, 361 U.S. 212, 217 (1960); trial before an impartial judge, Tumey v. Ohio, 273 U.S. 310, 513 (1927); and trial before a racially untainted jury and grand jury, (cont'd next page)

requirement that the prosecution prove the essential elements of the charge against the accused beyond a reasonable doubt is "so basic to a fair trial" that its violation should never be deemed harmless.

The Court has considered violations of the right to counsel, to trial before an unbiased judge or a racially untainted jury, and to a lack of variance between an indictment and the proof offered at trial, to be harmful per se for two reasons.

First, these rights serve to protect the structural integrity of and respect for the trial fact-finding process by providing safeguards that reduce the probabilities of a person being convicted of a crime that he did not commit. For although an accused is not entitled to a "perfect trial," he is entitled to one in which his chances of being

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e.g., Vasquez v. Hillery, 54 U.S.L.W. 4068 (January 14, 1986). See generally Brief for the Solicitor General, Point A2 (collecting cases).

acquitted are not unfairly hampered by his being tried without counsel, or before a biased judge or a racially tainted jury, or on a charge different from that for which he was indicted.

Second, each of these guarantees serve to protect interests of crucial importance to both the defendant and the state that would be severely diminished, if their violation were held harmless. The rights secured by the Fifth and Sixth Amendments to the Constitution which comprise the essence of our adversial system of justice would be rendered meaningless if it were possible for a person to be arrested on one charge and then made to stand trial on a different charge without the benefit of notice or counsel, before a racially tainted jury, or before a judge who had a stake in the outcome of the proceeding. Whether or not the evidence against such a person were

overwhelming, such a proceeding would be so fundamentally at odds with our conception of due process of law that it could not be condoned, even if it reached the "right" result. The state may not establish guilt by flipping coins, or official pronouncement, secure in the knowledge that it can seek to prove guilt beyond a reasonable doubt on appellate or habeas review.

A criminal trial conducted under an impermissible burden of proof is similarly foreign to our conception of fundamental fairness.

A. THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT OF THE ESSENTIAL ELEMENTS OF THE CHARGE AGAINST THE ACCUSED IS ESSENTIAL TO THE MAINTENANCE OF THE INTEGRITY OF THE TRIAL FACT-FINDING PROCESS

It was not until this Court's decision in In re Winship, 397 U.S. 358 (1970) that the Due Process Clause was held to "protect the accused against conviction except upon proof beyond a reasonable doubt of every fact

necessary to constitute the crime charged." Id. at 365. As the Winship Court recognized, however, this requirement was already deeply rooted in our scheme of justice.[2] In re Winship, 397 U.S. at 362.[3] After reviewing

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[2] All the members of this Court in Winship except Justice Black agreed with the holding that proof of guilt beyond a reasonable doubt was required in criminal cases. Justice Harlan, in his concurring opinion, stated that "the requirement of proof beyond a reasonable doubt in a criminal case [is] bottommed as a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Justice Harlan further noted that "[i]t is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation." In re Winship, 377 U.S. at 372 (Harlan, J., concurring).

[3] Although one early commentator traced the reasonable doubt standard to the Irish Trials of 1798, Finney's Case, 26 How. St. Tr. 1019 (Ire. 1798) and Bond's Case, 27 How. St. Tr. 523 (Ire. 1798), see May, "Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases," 10 A.L.Rev. 642, 656-58 (1876), a more recent commentator has traced it back even earlier to the Boston Massacre Trials of 1770, Rex v. Wemms, reported in 3 Legal Papers of John Adams 93-314 (L.Wroth and H. Zobel eds. 1965). See Morano, "A Reexamination of the Development of the Reasonable (cont'd next page)

the decisions of this court in which it had

Doubt Rule, 53 B.U.L.Rev. 507, 515-19 (1975). Still other commentators have noted its deep roots in the cultural and religious precepts of various societies. See, e.g., Maimonides, Safer Ha Mitzvot, Negative Commandment 290, quoted in N.L.Rabinovich, Probability and Statistical Inference in Ancient and Medieval Jewish Literature 111 (1973). In explaining reasons for that Commandment's mandate that punishment not be carried out except upon the proof near certainty that the accused committed the act stated, Maimonides stated:

> 290 Commandment is the prohibition to carry out punishment on a high probability, even close to certainty. ... Do not think this law unjust. For among contingent things some are very likely, other possibilities are very remote, and yet others are intermediate. The "possible" is very wide. Had the Torah permitted punishment to be carried out when the possibility is very likely such that it is almost a necessity .... some might inflict punishment when the chances are somewhat more distant that that, and then when they are ever further still, until they would punish and execute people unjustly on slight probability according to the judge's imagination. Therefore, the almighty shut this door and commanded that no punishment be carried out except where there are witnesses who testify that the matter is establshed in certainty beyond any doubt, and moreover, it cannot be explained otherwise in any manner. If we do not punish on very strong

(cont'd next page)

been "assumed that proof of a criminal charge [was] constitutionally required", Justice Brennan explained the "cogent reasons" why "the 'reasonable-doubt' standard plays so vital a role in the American scheme of criminal procedure" and "is a prime instrument for the reducing the risk of conviction resting on factual error" (id. at 363):

> There is always in litigation a margin of error, representing error in fact-finding which both parties must take into account. Where one party has at stake an interest of transcending value-- as a criminal defendant his liberty--this margin of error is reduced as

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> probabilities, nothing can happen other than that a sinner be freed; but if punishment be done on probability and opinion it is possible that one day we might kill an innocent man -- and it is better and more desirable to free a thousand sinners, than ever to kill one innocent.

See also Justinian, Digest, 48. (collected in G.S.P. Scott, The Civil Law 110 (1932).

> to him by the process of placing on the other party the burden of ... persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt. ... To this end, the reasonable-doubt standard is indispensible for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'

397 U.S. at 364 (citations omitted).

Thus, as this Court recognized in Winship, it is not only the accused who has an interest in his conviction resting on proof beyond a reasonable, but also the community at large and the prosecution:

> ... [U]se of the reasonable doubt standard is indispensible to commanding the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs

> have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.

Id. See also Underwood, "The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases", 86 Yale L.J. 1299 (1977).

In subsequent cases discussing the reasonable doubt standard, this Court has not departed from either Winship's definition of the reasonable-doubt requirement or its understanding of the high purpose that it serves. See, e.g., Ivan v. City of New York, 407 U.S. 203 (1972); Lego v. Twomey, 404 U.S. 477 (1972); Mullaney v. Wilbur, 421 U.S. 684 (1975); Hankerson v. North Carolina, 432 U.S. 233 (1977); Patterson v. New York, 432 U.S. 197 (1977); Sandstrom v. Montana, supra; Ulster County Court v. Allen, 442 U.S. 140 (1979); Connecticut v. Johnson, 460 U.S. 73 (1983); Reed v. Ross, 82 L.Ed.2d 1 (1984); Francis v. Franklin, 85 L.Ed.2d 344 (1985).

Thus, in Francis v. Franklin, supra, the Court noted that Sandstrom "made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden enunciated in Winship on the critical question of intent in a criminal prosecution." Francis v. Franklin, 85 L.Ed.2d at 361.

B. THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT OF THE ESSENTIAL ELEMENTS OF THE CHARGE AGAINST THE ACCUSED SERVES TO PROTECT INTERESTS OF VITAL IMPORTANCE TO OUR SYSTEM OF JUSTICE

Several interests crucial to an accused's right to fair trial are protected by the requirement that the prosecution prove the essential elements of the charge against the accused beyond a reasonable doubt.

First, this requirement is essential to the maintenance of the presumption of innocence in a criminal case. Indeed, as Justice Brennan stated in Winship, the

reasonable-doubt standard "provides concrete substance for the presumption of innocence -- that bedrock 'axiomatic and elementary' principal whose 'enforcement lies at the foundation of the adminsitration of our criminal law.' In re Winship, supra, 397 U.S. at 363, quoting Coffin v. United States, 156 U.S. 432, 453 (1895). See also Estelle v. Williams, 425 U.S. 501, 503 (1976) (the "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial, under our system of criminal justice"); Taylor v. Kentucky, 436 U.S. 478 (1978).

Second, the requirement that the prosecution prove beyond a reasonable doubt the existence of every element of the offense charged against the accused is essential to the right to a jury trial, a right held by this Court to be "fundamental to the American scheme of justice," Duncan v. Louisiana, 391

U.S. 145, 149 (1968).[4] An accused's right to a jury trial entitles him not merely to a certain number of jurors drawn from a cross-section of the community, but to "a fair trial by a panel of impartial, 'indifferent', jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). See also Turner v. Louisiana, 379 U.S. 466 (1965). To say that an accused can still obtain a "fair jury trial" even though the jury is improperly instructed as to the burden of proof to be applied on an essential element of the charge against him is to exalt form over substance, irrationality over reason. See, e.g., Jackson v. Virginia, 443 U.S. 307, 317 (1979) ("The Winship doctrine requires more than simply a trial ritual. A

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[4] So important was the right to a jury trial to the Framers that it was stated not once but twice in the Constitution. Article III, Section 2 provides that "the trial of all crimes, except in case of impeachment, shall be by jury." The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence. A 'reasonable doubt' at a minimum, is one based upon 'reason.'") Id. at 317.

Further, the reasonable-doubt standard serves to protect the distinction between the role of the judge and the jury in a criminal trial and to prevent the judge from directing a verdict against the accused. See, e.g., Connecticut v. Johnson, supra, 460 U.S. at 84; see also United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947); Bollenbach v. United States, 326 U.S. 607 (1946).

The State, as well as the accused, has an interest in ensuring that the Sixth Amendment right to a jury trial is preserved and protected. Cf. Singer v. United States,

380 U.S. 24, 36 (1955) ("Government, as a litigant has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result"); Patton v. United States, 281 U.S. 276 312 (1930) ("[The] maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions that before a waiver can become effective, the consent of the government counsel and the sanction of the Court must be had....")

Thus, in Rose v. Mitchell, 443 U.S. 545 (1979) and Vasquez v. Hillery, 54 U.S.L.W. 4068 (1986), this Court adopted a per se rule invalidating the convictions of persons indicted or convicted by a grand or petit jury whose members were selected in a racially discriminatory manner. As the Court noted in Rose and Vasquez, the strength of

the prosecution's case in such a setting is irrelevant to the structural imperative of assuring a jury trial untainted by racism. A trial before a jury tainted by racism is simply foreign to our concept of ordered justice. Similarly, a trial before a jury which has been misled as to its burden of proof obligation is inconsistent with our conception of a fair criminal process. Even if a racially tainted jury or a jury confused as to the burden of proof happens to reach the "right" result in a particular case, it cannot be treated as a legitimate exercise of governmental authority.

C. THE HARMLESS ERROR DOCTRINE, WHICH AFFORDS RELIEF FOR CONSTITUTIONAL ERROR UNLESS A REVIEWING COURT FINDS THAT THE ERROR COMPLAINED OF WAS HARMLESS BEYOND A REASONABLE DOUBT, IS NOT EQUIVALENT TO THE "CAUSE-AND-PREJUDICE" STANDARD APPLIED IN UNITED STATES V. FRADY, AND HAS NO APPLICATION HERE BECAUSE IT IS IMPOSSIBLE FOR A REVIEWING COURT TO DETERMINE THE EFFECT OF THE IMPROPER INSTRUCTION ON THE VERDICT

The harmless error doctrine permits a

reviewing court to ignore constitutional error on appeal only if it finds that the error complained of was harmless beyond a reasonable doubt. Chapman v. California. See also Milton v. Wainwright, 407 U.S. 371, 372 (1972); Schneble v. Florida, 405 U.S. 427, 428 (1972); Harrington v. California, 395 U.S. 250, 251 (1969). In order to make such a determination in a case such as this, the reviewing Court must be able to determine beyond a reasonable doubt that the jury's verdict was not the result of the Court's improper instruction but rather that it resulted solely from evidence presented in the case.

In a sleight of hand that attempts to cover over critical differences between the harmless error standard of Chapman and the prejudice prong of the cause and prejudice standard of Wainwright v. Sykes, 433 U.S. 72 (1977), the Solicitor General argues that

United States v. Frady, 456 U.S. 152 (1982) has already decided both 1) that a case-by-case assessment of whether Sandstrom error can be disregarded is required, and 2) that the standard for disregarding Sandstrom error is quite low. See generally Brief for the Solicitor General, Point B2. This Court's decisions make plain, however, that different interests are implicated in the two situations, and that the standards are far from equal. The issue here is not, as the Solicitor General's brief repeatedly assumes, whether the errors at defendant's trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension," which is the standard for determining whether a Sandstrom claim not raised below is nonetheless cognizable on habeas corpus. United States v. Frady, supra. Rather, the issue here is quite different: whether, the

defendant having timely objected at trial and properly raised the issue thereafter, the state has shown the error to be harmless beyond a reasonable doubt. Chapman, supra. It is, of course, one thing to say (as this Court said in Frady) that courts can determine prejudice, where a defendant has failed to timely raise and miss an objection to instructions, by assessing whether a defendant has shown "actual and substantial disadvantage infecting his entire trial with error of constitutional dimension," 456 U.S. at 170, and quite another to hold that courts can reliably find beyond a reasonable doubt that the Sandstrom error has not possibly affected the jury's decision. A defendant's burden of justifying federal collateral review where he failed to raise a claim is his state trial is quite irrelevant to the state's burden in Chapman. In short, Frady is quite inapposite here.

A Chapman determination in a case like the one now before the Court is simply impossible. As the Johnson plurality recognized:

> An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider the evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevent.

Connecticut v. Johnson, 460 U.S. at 86. See also Conway v. Anderson, 698 F.2d 282, 285 (6th Cir. 1983); Mason v. Balkon, 669 F.2d 222 (5th Cir. 1982).

Jurors in criminal cases, for the most part, are neither lawyers nor persons who have been trained in the law. Thus, it can not be presumed that the members of the jury

both understood the defective instruction but also knew the law well enough to know that it should be disregarded. See, e.g., McCormick, Evidence 965 (3rd Ed. 1984) ("One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof'").

Finally, even if assuming that the harmless error determination could theoretically be made in some Sandstrom cases, this case, like Francis v. Franklin, supra, is not one in which it would result in reversal. The instruction was not only confusing but the evidence on the issue of guilt itself was contradictory. Given the close and intertwined connection in the juror's minds between the question of malice and the question of insanity, simply as a matter of common sense and understanding, the unconstitutional instruction that malice

could be presumed would inevitably and colorably affect the jury's consideration of that defense. At the least, it is impossible to say with confidence that such an untoward affect on fair consideration of the defense did not, beyond a reasonable doubt, take place. Nor is this likelihood affected, as the Solicitor General urged, by the fact that under Tennessee law the jury was to consider the insanity defense only after resolution of the malice issue. To the contrary, it is highly likely that a jury that had presumed malice, or ignored evidence against it, in conformity with the instructions, would be more than ordinarily inclined to reject an insanity defense as well.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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